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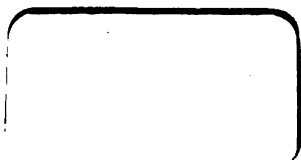
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**SELECT CASES AND OTHER
AUTHORITIES
ON
THE LAW OF TRUSTS**

**BY
AUSTIN WAKEMAN SCOTT
PROFESSOR OF LAW IN HARVARD UNIVERSITY**

**LANGDELL HALL, CAMBRIDGE
PUBLISHED BY THE EDITOR
1919**

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**THE PLIMPTON PRESS
NORWOOD, MASS., U.S.A.**

PREFACE

IN 1882 Professor James Barr Ames published the first edition of his collection of Cases on Trusts; in 1893 he published a second edition. This book is far more than a mere collection of cases. In its analysis of the subject and in its extensive annotations it has been a notable contribution to legal scholarship. It has frequently been the guide of courts and of legal writers. It has determined the scope of the course on Trusts as it is taught today in the law schools of the United States. More than a quarter of a century, however, has elapsed since the appearance of the second edition of Professor Ames's book. There has been a considerable development of the subject in this time. Certain changes in emphasis and in arrangement have become necessary. The subjects of resulting and constructive trusts, which were not treated in the second edition of Ames's Cases, and the subject of charitable trusts, which was not treated in either edition, are of great importance. In these subjects, and indeed in all the subjects treated herein, there has been during the last twenty-five years a wealth of new material from which to draw.

The editor cannot adequately express the great debt that he owes to Professor Ames under whom he had the privilege of studying for three years. Only those who have had the same privilege can realize the extent of that debt. The matter contained in Ames's Cases and also the invaluable MS. notes which Professor Ames was accustomed to take with him to the classroom have been put at the editor's disposal. The editor has reprinted many notes contained in Ames's Cases, as corrected and supplemented by his MS. annotations, chiefly those notes which are of historical interest, or which relate to controverted points. The source of these notes is duly indicated. It is impossible to indicate the extent to which many of the other notes are due to suggestions derived from Professor Ames.

For the Form of Trust-Deed in the Appendix, the editor is indebted to his friend, Francis R. Boyd, Esq., of the Massachusetts Bar.

A. W. S.

LANGDELL HALL,
MARCH 1, 1919.

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LIST OF LORD CHANCELLORS AND LORD KEEPERS

[SINCE THE BEGINNING OF THE REIGN OF HENRY VIII.]

Henry VIII. (1509)	Warham, Archbishop of Canterbury	1504
	Wolsey, Cardinal	1515
	Sir Thomas More	1529
	Sir Thomas Audley	1532
Edward VI. (1546-7)	Wriothesley	1544
	St. John (William Paulet)	1547
	Rich	1547
	Goodrich, Bishop of Ely	1551
Mary (1553)	Gardiner, Bishop of Winchester	1553
	Heath, Archbishop of York	1556
Elizabeth (1558)	Sir Nicholas Bacon	1558
	Sir Thomas Bromley	1579
	Sir Christopher Hatton	1587
	Sir John Puckering	1592

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James I. (1602-3)	Ellesmere (Thomas Edgerton)	1596
	Bacon	1617
Charles I. (1625)	Williams, Bishop of Lincoln	1621
	Coventry	1625
	Finch (John)	1640
	Lyttleton	1641
Charles II. (1648-9)	Clarendon (Edward Hyde)	1658
	Sir Orlando Bridgeman	1667
	Shaftesbury (Anthony Ashley Cooper)	1672
	Nottingham (Heneage Finch)	1673
James II. (1684-5)	Guilford (Francis North)	1682
	Jeffreys	1685
William and Mary (1688-9)	Somers	1693
Anne (1701-2)	Sir Nathan Wright	1700
	Cowper	1705, 1714
	Harcourt	1710
George I. (1714)	Macclesfield (Thomas Parker)	1718
	King	1725
George II. (1727)	Talbot	1733
	Hardwicke (Philip Yorke)	1737
George III. (1760)	Northington (Robert Henley)	1757
	Camden (Charles Pratt)	1766
	Bathurst	1771
	Thurlow	1778
	Loughborough (Alexander Wedderburn)	1793
George IV. (1820)	Eldon (John Scott)	1801, 1807
	Erskine	1806
William IV. (1830)	Lyndhurst (John Singleton Copley)	1827, 1834, 1841
	Brougham	1830
Victoria (1837)	Cottenham (Charles Christopher Pepys)	1836, 1846
	Truro (Thomas Wilde)	1850
	St. Leonards (Edward Sugden)	1851
	Cranworth (Robert Monsey Rolfe)	1852, 1865
	Chelmsford (Frederick Thesiger)	1858, 1866
	Campbell	1859
	Westbury (Richard Bethel)	1861
	Cairns	1868, 1874
	Hatherley (William Page Wood)	1868
	Selborne (Roundell Palmer)	1872, 1880
	Halsbury (Hardinge Stanley Giffard)	1885, 1886, 1895
	Herschell	1886, 1892
Edward VII. (1901)	Loreburn (Robert Threshie Reid)	1905
George V. (1910)	Haldane (Richard Burdon)	1912
	Buckmaster	1915
	Finlay	1916
	Birkenhead (Frederick Edwin Smith)	1919

For an account of the English Chancellors, see Campbell, *Lives of the Chancellors*; Atlay, *The Victorian Chancellors*. For an account of the reports in which their decisions are to be found, see Wallace, *Reporters*, 4 ed., 457-518; Fox, *Hand Book of English Law Reports*. See also 15 Harv. L. Rev. 109, 117.

At the beginning of the 19th century there were two judges in the High Court of Chancery, the Chancellor or Lord Keeper (whose authority is the same as that of a Chancellor though the title is of less dignity) and the Master of the Rolls. A dispute as to how far the Master of the Rolls had independent authority was settled by Stat. 3 Geo. II. c. 30 (1730), which provided that all orders and decrees made by him while acting within his authority should be deemed valid orders and decrees of the Court of Chancery, but subject to be revised or modified by the Chancellor. In 1813 a Vice-Chancellor was created, and in 1841 provision was made for two additional Vice-Chancellors. In 1851 two Lords Justices of the Court of Appeal in Chancery were created. Thereafter the three Vice-Chancellors and the Master of the Rolls sat as equity judges of first instance; and the Chancellor might also act as a judge of first instance though he seldom did so. From the decision of any of the three Vice-Chancellors or the Master of the Rolls there lay an appeal to the Court of Appeal in Chancery, in which the Chancellor might sit alone or the two Lords Justices together although in some matters a Lord Justice might sit alone. By the Judicature Act, 1873, the Supreme Court of Judicature was created, composed of the High Court of Justice and the Court of Appeal. The High Court of Justice was composed of five (reduced in 1880 to three) divisions, one of which is the Chancery Division, of which the Chancellor is President. From the latter part of the 17th century an appeal lay from the Court of Chancery, and now lies from the Court of Appeal, to the House of Lords. The Chancellor, unlike the other judges, is a political officer and the office usually changes hands on a change of ministry.

Until 1841 the Court of Exchequer was a court of equity as well as a court of law. An appeal lay from the equity side to the House of Lords. But in 1841 its general equity jurisdiction was transferred to the Court of Chancery.

As to the development of equity jurisdiction in the United States, see Fonblanque, *Equity*, 4 Am. ed., 12; Pomeroy, *Eq. Juris.*, secs. 40-42, 282-358; Story, *Equity Jurisprudence*, chap. 2.

CASES ON TRUSTS

CHAPTER I.

THE NATURE OF A TRUST

SECTION I.

A Trust distinguished from a Use.

AMES, LECTURES ON LEGAL HISTORY, 236-237. We find in the books many references to uses of lands, from the latter part of the twelfth to the beginning of the fifteenth century, but no intimation of any right of the intended beneficiary to proceed in court against the feoffee.¹ But the evidence against such a right is not merely negative. In 1402 a petition to Parliament by the Commons prays for relief against disloyal feoffees to uses because "in such cases there is no remedy unless one be provided by Parliament."² The petition was referred to the King's Council, but what further action was taken upon it we do not know. But from about this time bills in equity became frequent.³ It is a reasonable inference that equity

¹ In a valuable "Note on the Phrase *ad opus* and the Early History of the Use" in 2 Pollock and Maitland, *Hist. of English Law*, 232 *et seq.*, the reader will find the earliest allusions to uses of land in England. [See 2 Maitland, *Collected Papers*, 403; 8 Harv. L. Rev. 127.] See also Bellewe, *Collusion*, 99 (1385); Y. B. 12 Ed. III. (Rolls ed.), 172; Y. B. 44 Ed. III. 25 b, pl. 34; Y. B. 5 Hen. IV. f. 3, pl. 10; Y. B. 7 Hen. IV. f. 20, pl. 1; Y. B. 9 Hen. IV. f. 8, pl. 23; Y. B. 10 Hen. IV. f. 3, pl. 3; Y. B. 11 Hen. IV. f. 52, pl. 30. The earliest statutes relating to uses are 50 Ed. III. c. 6; 1 Rich. II. c. 9; 2 Rich. II. St. 2, c. 3; 15 Rich. II. c. 5; 21 Rich. II. c. 3. — AMES.

² 3 Rot. Parl. 511, No. 112. — AMES.

³ The earliest bills of which we have knowledge are the following, arranged in chronological order to the end of the reign of Henry VI.: *Godwyne v. Profyt*, 10 Seld. Soc'y, Sel. Cas. Ch. No. 45 (after 1393); *Holt v. Debenham*, *ibid.*, No. 71 (1396-1403); *Chelmewyke v. Hay*, *ibid.*, No. 72 (1396-1403); *Byngley v. Grymesby*, *ibid.*, No. 99 (1399-1413); *Whyte v. Whyte*, *ibid.*, No. 100 (1399-1413); *Dodd v. Browing*, 1 Cal. Ch. XIII. (1413-1422); *Rothenhale v. Wynchingham*, 2 Cal. Ch. III. (1422); *Messynden v. Pierson*, 10 Seld. Soc'y, Sel. Cas. Ch. No. 117 (1417-1424); *Williamson v. Cook*, *ibid.*, No. 118

gave relief to *cestuis que use* as early as the reign of Henry V. (1413-1422), although there seems to be no record of any decree in favor of a *cestui que use* before 1446.¹ The first decree for a *cestui que use*, whenever it was given, was the birth of the equitable use in land. Before that first decree there was and could be no doctrine of uses. One might as well talk of the doctrine of gratuitous parol promises in our law of to-day.

THE STATUTE OF USES.

27 Hen. VIII. c. 10 (1536).

WHERE by the common laws of this realm, lands, tenements and hereditaments be not devisable by testament, (2) nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made *bona fide*, without covin or fraud; (3) yet nevertheless divers and sundry imaginations, subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries and other assurances craftily made to secret uses, intents and trusts; (4) and also by wills and testaments, sometime made by nude parolx and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance; (5) at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; (6) by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries and other like assurances to uses, confidences and trusts, divers and many

(1417-1424); Huberd *v.* Brasyer, 1 Cal. Ch. XXI. (1429); Arundell *v.* Berkeley, 1 Cal. Ch. XXXV. (1435); Rous *v.* FitzGeffrey, 10 Seld. Soc'y, Sel. Cas. Ch. No. 138 (1441); Myrfyne *v.* Fallan, 2 Cal. Ch. XXI. (1446); Felubrigge *v.* Damme, and Sealis *v.* Felbrigge, 2 Cal. Ch. XXIII. and XXVI. (1449); Saundre *v.* Gaynesford, 2 Cal. Ch. XXVIII. (1451); Anon., Fitzh., Abr. Subp., pl. 19 (1453); Edlyngton *v.* Everard, 2 Cal. Ch. XXXI. (1454); Breggeland *v.* Calche, 2 Cal. Ch. XXXVI. (1455); Goold *v.* Petit, 2 Cal. Ch. XXXVIII. (1457); Anon., Y. B. 37 Hen. VI. f. 35, pl. 23; Walwine *v.* Brown, Y. B. 39 Hen. VI. f. 26, pl. 36; Furby *v.* Martyn, 2 Cal. Ch. XL. (1460). — AMES.

¹ Myrfyne *v.* Fallan, 2 Cal. Ch. XXI. — AMES.

heirs have been unjustly at sundry times disherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fair fils chivalier & pur file marier*, (7) and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles and duties; (8) also men married have lost their tenancies by the curtesy, (9) women their dowers, (10) manifest perjuries by trial of such secret wills and uses have been committed; (11) the King's highness hath lost the profits and advantages of the lands of persons attainted, (12) and of the lands craftily put in feoffments to the uses of aliens born, (13) and also the profits of waste for a year and a day of lands of felons attainted, (14) and the lords their escheats thereof; (15) and many other inconveniences have happened, and daily do increase among the King's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; (16) for the extirping and extinguishment of all such subtle practiced feoffments, fines, recoveries, abuses and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the King's highness, or any other his subjects of this realm, shall not in any wise hereafter by any means or inventions be deceived, damaged or hurt, by reason of such trusts, uses or confidences: (17) it may please the King's most royal majesty, That it may be enacted by his Highness, by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, in manner and form following; that is to say,

That where any person or persons stand or be seized, or at any time hereafter shall happen to be seized, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politick, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner means whatsoever it be; that in every such case, all and every such person and persons, and bodies politick, that have or hereafter shall have any such use, confidence or trust, in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence or trust, in remainder or reverter, shall from henceforth stand and be seized, deemed and adjudged

in lawful seisin, estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in use, trust or confidence of or in the same; (19) and that the estate, title, right and possession that was in such person or persons that were, or hereafter shall be seized of any lands, tenements or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politick, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence or trust, after such quality, manner, form and condition as they had before, in or to the use, confidence or trust that was in them.¹ . . .

ANONYMOUS.

—, 1545.

Bro. Abr. Feoff. al Uses, pl. 52, March's *Tranal.*, 94.

A MAN makes a feoffment in fee to his use for term of life, and that after his decease J. N. shall take the profits; this makes a use in J. N. Contrary if he says that after his death his feoffees shall take the profits and deliver them to J. N., this doth not make a use in J. N.: for he hath them not but by the hands of the feoffees.

BACON, *READING ON THE STATUTE OF USES*, 10. It followeth to consider the parts and properties of an use: wherein by the consent of all books, as it was distinctly delivered by Justice Walmsley in 36 of Elizabeth: That a trust consisteth upon three parts:

The first, that the feoffee will suffer the feoffor to take the profits.

The second, that the feoffee upon request of the feoffor, or notice of his will, will execute the estates to the feoffor, or his heirs, or any other by his direction.

¹ See Holdsworth, *The Political Causes which shaped the Statute of Uses*, 26 *Harv. L. Rev.* 108.

On the question how far the Statute of Uses is in force in the United States, see Perry, *Trusts*, sec. 299n.; 16 *L. R. A. (N. S.)* 1148.

The third, that if the feoffee be disseised, and so the feoffor disturbed, the feoffee will re-enter, or bring an action to re-continue the possession. So that those three, pernanacy of profits, execution of estates, and defence of the land, are the three points of trust.

HOOPER v. FELGNER.

COURT OF APPEALS, MARYLAND. 1894.

80 Md. 262.

ROBINSON, C. J.¹ . . . After several specific devises and bequests, the testator, by the twelfth clause, directed that all the residue of his estate, real and personal, should be divided into ten equal parts; one equal part thereof he devised and bequeathed to each of his four sons, absolutely. The remaining six parts he devised and bequeathed to his four sons upon trust for his six daughters, in manner following:

"And as to one-tenth part of my said entire residuary estate upon trust to pay the net income thereof as it shall accrue (except as hereinafter provided) unto my daughter, Grace Felgner, during her natural life, and for her sole and separate use, without power of anticipation, or to charge or encumber the trust estate; and from and after her decease, *upon trust* for all and singular the children or child of the said Grace living at her death, and the issue then surviving of any child or children of the said Grace who may be then deceased, equally and *absolutely*; but so that the issue of a deceased child or children, if any, shall take by representation the share or shares only, which their parent or parents, if living, would have taken.

"In case of any one or more of my said six daughters dying without leaving issue surviving, then I give, devise and bequeath the tenth part or tenth parts of my residuary estate devised above in trust for the benefit of such, my daughter or daughters so dying without surviving issue, unto all and every my grandchildren who shall survive such my daughter or daughters so dying, and the then surviving issue of any of my grandchildren who may have previously departed this life leaving such surviving issue, absolutely and equally *per capita* as to such surviving grandchildren, but by representation as to such issue of

¹ The statement of facts and a part of the opinion are omitted.

deceased grandchildren, who are to take by substitution only what their respective parents would have taken had they survived."

Grace Felgner, the life-tenant, died in 1893, leaving two children, Marie Theresa, about nineteen years, and Catharine, about thirteen years of age. These were her only children, and both of them were living at the death of their grandfather, William E. Hooper, the testator.

The plain and obvious intention of the testator was to create and protect a life-estate for his daughter, Grace Felgner, with remainder to her children, if any, and the children of any deceased child *per stirpes*; and in the event of the failure of such children or descendants, then to the other grandchildren of the testator, either nominated by will, or in case of no such nomination, then to his grandchildren generally. The trustees, it is clear, therefore, took a legal *estate* in the trust property, the *equitable life-estate* being in Grace Felgner, the testator's daughter, and the *equitable remainder* being in her two children, then living, subject to the contingency of their death before their mother, and subject in case they survived her, to be diminished by the birth and survival of other children of their mother. And the mother having died, leaving as her only children or descendants Marie Theresa and Catharine, these two children of the life-tenant answer the description of those entitled in remainder; they answer that description at the time of the happening of the contingency, namely, the death of their mother, without other children or descendants, and they are therefore the only persons who could ever have answered it. And this brings us to the real question in this case. Does the trust created by the will continue after the death of Grace Felgner, the life-tenant, or does the property upon her death vest absolutely in her two daughters, both of whom were living at that time? There is nothing, it must be admitted, in the will, providing expressly for the continuance of the trust beyond the life of Grace Felgner, the testator's daughter, nor is there anything from which it can be fairly implied that the testator meant that it should continue after her death. During her life, certain duties are imposed upon the trustees, the language of the will being, "Upon trust to pay the net income thereof, as it shall accrue (except as hereinafter provided), unto my daughter, Grace Felgner, during her natural life, and for her *sole and separate* use, without power of anticipation or to charge or

encumber the trust estate, and from and after her decease upon trust for all and singular the children or child of the said Grace living at her death, and the issue *then* surviving of any child or children of the said Grace, who may be then deceased, *equally and absolutely.*" The testator does not say that the trustees shall after the death of his daughter receive and pay the net income of the trust property to her children or descendants living at that time, for their sole and separate use, nor does he impose any limitation upon the power of the remaindermen to charge or incumber the estate. After her death they are to hold the property in trust for all and singular the children or child of the said Grace living at her death, *equally and absolutely.* Where an estate is given to trustees and their heirs upon trust to receive and pay the net income thereof to one for life, and upon his death, in trust for all and singular his children and the issue of such children living at the death of the life-tenant, the trust ceases upon the death of such life-tenant, for the reason that it remains no longer an active trust. In such cases the Statute of Uses executes the use in those who are limited to take upon the expiration of the life-estate; or, in other words, the statute transfers the use into possession by converting the estate or interest of the *cestui que trust* into a legal estate, thereby determining the intermediate estate of the trustee. As to the real estate, it is clear, therefore, that upon the death of Grace Felgner, the life-tenant, the trustees, having no longer any active duties to perform, the legal estate was executed under the statute in her two children, and the trust was thereby at an end.

Now, as to the personal property, though it has been said that the object of the statute was to abolish all uses and trusts, yet, as the language of the statute was: "*Whenever any person is seized,*" &c., the English Courts, by a strict construction, held that it did not apply to personal property, for the reason that one could [not] be said to be "*seized*" of a mere *chattel interest*. At the same time, however, it may be considered settled, that a trust in regard to personal property will continue so long and no longer, than the purposes of the trust require. And that when all the objects of the trust have been accomplished, the person entitled to the beneficial use is regarded as the absolute owner, and as such, entitled to the possession of the property. Under this will the objects and purposes of the trust, namely, that the trustees should pay the net income

to Grace Felgner during her life, and for her sole and separate use, without power of anticipation, &c., were fully accomplished, and upon her death the trustees had no longer any active duty to discharge. And this being so, her two children being entitled to the ultimate use, became the absolute owners of the property.

Nor can we agree with the Court below, that the fact of the minority of one of the *cestui que trusts*, is any reason why the trust should continue until she is *sui juris*. . . .

We find nothing from which it can be inferred that the testator meant the trust to continue after the death of his daughter, the life-tenant.

The purposes of the trust having been accomplished, and the trustees having no longer any active duties to perform, and Marie Theresa Felgner, one of the daughters, being over eighteen years of age, she is entitled in her own right to her share of the personal estate. And as to the other daughter, Catharine Hooper Felgner, she has, the record shows, guardians legally appointed and qualified, and this being so, such guardians are entitled to receive her share of the personal estate. There can be no reason why the trust should continue merely to allow the trustees to receive the income and pay it over to her guardians. In the case of an ordinary bequest to an infant, the guardians are the proper persons to take the property bequeathed and, where a trust has terminated, and one who becomes thereby the absolute owner of the property is a minor, there is no reason why the guardian should not take and hold the property for the benefit of his ward.

*Decree reversed and cause remanded in both appeals.*¹

ANONYMOUS.

CHANCERY. —

Cary 11.

ALTHOUGH [*cestui que use*] of a term for years be not within the Statute of Uses, rather therefore he shall have remedy in Chancery.

¹ But see, as to personality, *Glover v. Condell*, 163 Ill. 566, 588. As to land, see *McFall v. Kirkpatrick*, 236 Ill. 281; *Hartley v. Wyatt*, 281 Ill. 321; *Phillips v. Vermeule*, 88 N.J. Eq. 500; *Perry, Trusts*, secs. 309, 320.

As to the extent of the estate taken by the trustee, see *Perry, Trusts*, chap. 10.

BACON, READING ON THE STATUTE OF USES, 42. THE second word material is the word *seised*: this excludes chattels. The reason is, that the statute meant to remit the common law, and not but that the chattels might ever pass by testament or by parole; therefore the use did not pervert them. It excludes rights, for it is against the rules of the common law to grant or transfer rights; and therefore the statute would not execute them.

COMPLEAT ATTORNEY, ed. 1656, 315. IF I be seised of land in fee, and convey it to D. L. and his heirs, to the use of W. S., his executors and administrators, for twenty years, or for any other number of years, in this case the use will be executed within the Statute: But in case where I be possessed of a term of years in being, and grant it to friends to any uses and purposes in trust, this is out of the Statute of Uses, and orderable in Chancery only, where if the trust be broken, I must have remedy.¹

ANONYMOUS.

COMMON BENCH. 1532.

Bro. Abr. Feoff. al Uses, pl. 40, March's Transl., 90.

THERE is a tenure betwixt the donors and the donees, which is a consideration that the tenant in tail shall be seized to his own use; and the same law of tenant for term of years, and tenant for life, their fealty is due; and where a rent is reserved, there, though a use be expressed to the use of the donor, or lessor; yet this is a consideration that the donee or lessee shall have it to his own use: and the same law where a man sells his land for 20*l.* by indenture, and executes an estate to his own use; this is a void limitation of the use: for the law by the consideration of money, makes the land to be in the vendee.²

¹ See Fox's Case, 8 Co. 93 *b*; Barker v. Keate, 2 Vent. 35, Freem. K. B. 249, 1 Mod. 262, 2 Mod. 249.

² See also Bro. Abr. Feoff. al Uses, pl. 54.

TYRREL'S CASE.

COURT OF WARDS. 1557.

2 Dyer 155 a.¹

JANE TYRREL, widow, for the sum of four hundred pounds paid by G. Tyrrel, her son and heir apparent, by indenture enrolled in chancery in the 4th year of E. VI. bargained, sold, gave, granted, covenanted, and concluded to the said G. Tyrrel all her manors, lands, tenements, &c. to have and to hold the said &c. to the said G. T. and his heirs for ever, to the use of the said Jane during her life, without impeachment of waste; and immediately after her decease to the use of the said G. T. and the heirs of his body lawfully begotten; and in default of such issue, to the use of the heirs of the said Jane for ever. *Quære* well whether the limitation of those uses upon the *habendum* are not void and impertinent, because an use cannot be springing, drawn, or reserved out of an use, as appears *prima facie*? And here it ought to be first an use transferred to the vendee before that any freehold or inheritance in the land can be vested in him by the inrollment, &c. And this case has been doubted in the Common Pleas before now; *ideo quære legem*. But all the Judges of C. B. and SAUNDERS, Chief Justice, thought that the limitation of uses above is void, &c. for suppose the Statute of Inrollments [cap. 16.] had never been made, but only the Statute of Uses [cap. 10.] in 27 H. VIII. then the case above could not be, because an use cannot be ingendered of an use, &c. See M. 10 & 11 Eliz. fol.

SAMBACH v. DALSTON.

CHANCERY. 1634.

Tothill 188.

BECAUSE one use cannot be raised out of another, yet ordered, and the defendant ordered to pass according to the intent.

COMPLEAT ATTORNEY, 314. IF I without any consideration bargain and sell my land by indenture, to one and his heirs, to the use of another and his heirs (which is a use upon a use) it seems the court will order this: But if it were in consideration

¹ Benl. (ed. 1669) 61, 1 And. 37, s. c.

of money by him paid, here it seems the express use is void both in law and equity.¹

And if a woman in consideration of four hundred pounds paid her by her son, bargain and sell her land by indenture to him and his heirs, to the use of herself for life, and after of the heirs of her son, in which case by law the fee-simple is to the son presently, and the use for life to the mother void; nor is there as it seems any relief for her in this court in a way of equity, because of the consideration paid, but if there were no consideration, on the contrary.

DOE ON THE DEMISE OF LLOYD v. PASSINGHAM.

KING'S BENCH. 1827.

6 B. & C. 305.

EJECTMENT for lands in the county of Merioneth. Plea, the general issue. At the trial before Burrough, J., at the last Summer assizes for Salop, it appeared that the lessor of the plaintiff claimed as devisee in tail under the will of Catherine Lloyd, who was co-heiress, with her sister Mary, of Giwn Lloyd, who died in 1774. In 1746, by indenture made between himself, G. Lloyd, of the first part, Sarah Hill of the second part, Sir Rowland Hill and John Wynne of the third part, and Sir Watkin Williams Wynne and Edward Lloyd of the fourth part; in consideration of an intended marriage with the said Sarah Hill, and of a sum of 8000*l.*, being the marriage portion of the said Sarah Hill, paid or secured to be paid to him Giwn Lloyd, he, Giwn Lloyd, did grant, release, and confirm unto the said Sir Watkin Williams Wynne and Edward Lloyd in their actual possession then being, by virtue of an indenture of bargain and sale, &c., and to their heirs and assigns, certain premises therein particularly described, and, amongst others, the premises in question; to have and to hold the said premises with their appurtenances, unto the said Sir Watkin Williams Wynne and Edward Lloyd, their heirs and assigns; to the only proper use and behoof of them the said Sir Watkin Williams Wynne and Edward Lloyd, their heirs and assigns for ever, upon trust, nevertheless, and subject to the several uses, intents, and pur-

¹ As to the law in regard to a use on a use, see the explanation advanced by Professor Ames in an article on "The Origin of Trusts" in 4 Green Bag 81; 21 Harv. L. Rev. 261; Ames, Lect. Leg. Hist. 243. This explanation is approved in Williams, Real Property, 20 ed., 174, and in Maitland, Equity, 42.

poses thereafter mentioned, that is to say, to the use of the said Giwn Lloyd and his heirs.¹ . . .

Giwn Lloyd died in 1774, and Sarah his wife in 1782, intestate, and without having had any issue. Catherine Lloyd, the testatrix, continued in possession of the estate from the death of Sarah Lloyd until the time of her own death, in 1787. For the defendants, it was contended, that the legal estate was vested in Sir W. W. Wynne and Edward Lloyd, by the deed of 1746, and, consequently, that neither Giwn Lloyd nor the testatrix had any legal estate; and, therefore, the lessor of the plaintiff could not derive any such estate from her. The learned Judge reserved the point, and the plaintiff having obtained a verdict, a rule nisi for entering a nonsuit was granted in Michaelmas term.

HOLROYD, J.² I agree with my Brother Bayley, that in this case there ought to be a new trial. Upon the first perusal of the deed in question I had no doubt that the legal estate was vested in the trustees, having always understood that an use cannot be limited upon an use; and although I was struck by the ingenuity of the distinction pointed out by Mr. Taunton, yet upon further consideration it appears to me that his argument does not warrant it. The argument is, that as the trustees did not in the first instance take to the use of another, but of themselves, they were in by the common law, and not the statute; that the first use was, therefore, of no effect, and the case was to be considered as if the deed had merely contained the second limitation to uses. But that is not so, for although it be true that the trustees take the seisin by the common law, and not by the statute, yet they take that seisin to the use of themselves, and not to the use of another, in which case alone the use is executed by the statute. They are, therefore, seised in trust for another, and the legal estate remains in them. As to the question of intention, even if it were intended that the deed should operate in a different mode from that pointed out by the law, when the legal estate is given to trustees, that intention cannot countervail the law. But the intention appears to me altogether doubtful; the absence of trustees to preserve contingent remainders affording a strong reason for supposing that the parties meant to give the legal estate to the trustees.

Rule absolute for a new trial.

¹ A part of the statement of facts, setting forth limitations of the equitable interest which did not take effect, is omitted.

² Concurring opinions of Bayley and Littledale, JJ., are omitted.

SYMSON v. TURNER.

CHANCERY. 1700.

1 Eq. Ca. Abr. 383n.

NOTWITHSTANDING this statute [the Statute of Uses] there are three ways of creating an use or a trust, which still remains as at common law, and is a creature of the court of equity, and subject only to their controul and direction: 1st, Where a man seised in fee raises a term for years, and limits it in trust for A., &c. for this the statute cannot execute, the termor not being seised. 2dly, Where lands are limited to the use of A. in trust to permit B. to receive the rents and profits; for the statute can only execute the first use. 3dly, Where lands are limited to trustees to receive and pay over the rents and profits to such and such persons; for here the lands must remain in them to answer these purposes; and these points were agreed to.¹

NEW YORK REAL PROPERTY LAW.²

Consol. Laws, 1909, chap. 52.

SEC. 91. Uses and trusts concerning real property, except as authorized and modified by this article, have been abolished; every estate or interest in real property is deemed a legal right, cognizable as such in the courts, except as otherwise prescribed in this chapter.

¹ On the question of the application of the Statute of Uses to wills, see *Baker v. White*, L. R. 20 Eq. 166; *Re Tanqueray-Willaume & Landau*, 20 Ch. D. 465, 478; *Re Brooke*, [1894] 1 Ch. 43; Gilbert, *Uses*, 356; Sanders, *Uses and Trusts*, 250.

In *Re Brooke*, *supra*, Chitty, J., said (p. 48): "The statute [of uses] itself, as has often been observed, does not of its own force apply to wills, the Statute of Wills having been subsequently passed, but testators are at liberty to employ the machinery of the statute for the purpose of manifesting their intention."

² These provisions in substantially the same form were first adopted in New York in 1830. Rev. Stat. 1830, Pt. 2, chap. 1, tit. 2. See Canfield, *New York Cases and Statutes on Trusts and Powers*; Chaplin, *Express Trusts and Powers*.

See also Cal. Civ. Code, secs. 847 ff.; How. Mich. Stat., secs. 10669 ff.; Gen. Stat. Minn., 1913, secs. 6701 ff.; Rev. Codes Mont., 1907, secs. 4549 ff.; N. Dak. Comp. L., 1913, secs. 5359 ff.; Okla. Rev. L., 1910, secs. 6655 ff.; S. Dak. Civ. Code, secs. 296 ff.; Wis. Stats., 1915, secs. 2071 ff.

SEC. 92. Every person, who, by virtue of any grant, assignment or devise, is entitled both to the actual possession of real property, and to the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest; but this section does not divest the estate of the trustee in any trust existing on the first day of January, eighteen hundred and thirty, where the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property which is the subject of the trust.

SEC. 96. An express trust may be created for one or more of the following purposes:

1. To sell real property for the benefit of creditors;
2. To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;
3. To receive the rents and profits of real property, and apply them to the use¹ of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto;
4. To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law.

SEC. 99. Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article, no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions of this chapter. Where a trust is valid as a power, the real property to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power.

SEC. 109. When the purpose for which an express trust is created ceases, the estate of the trustee shall also cease.

¹ The word "use" was substituted for the words "education and support or either" by Laws of 1830, ch. 320, sec. 10.

SECTION II.

A Trust distinguished from a Bailment.

ANONYMOUS.

COMMON PLEAS. 1339.

Y. B. 12 & 13 Edw. III. 244.

DETINUE of chattels to the value of 100*l.* against an Abbot by a man and his wife, on a bailment, made by the father of the wife when she was under age, of chattels to be delivered to his daughter, when she was of full age, at her will; and they counted that he delivered pots, linen, cloths, and 20*l.* in a bag sealed up, &c. — *Pole*. He demands money, which naturally sounds in an action of Debt or Account; judgment of the count. — *Stouford*. We did not count of a loan which sounds in Debt, nor of a receipt of money for profit, which would give an action of Account, but of money delivered in keeping under seal, etc., which could not be changed; and if your house were burnt, that would be an answer. — SCHARDELOWE. *Answer over*.¹

ASHLEY'S ADMINISTRATORS AND HEIRS v. DENTON.

COURT OF APPEALS, KENTUCKY. 1822.

1 Littell 86.

PER CURIAM. Thomas Denton and wife exhibited this bill in chancery against the administrators of Thomas Ashley, deceased, charging that said decedent was the son of the female complainant by a former husband; that during her widowhood she became possessed of sundry slaves, which passed to her from the estate of a deceased relative in North Carolina, where she resided, and that she removed with them to Kentucky, in some of the upper counties; that she entrusted the negroes aforesaid with her said son, for the purpose of his going in search of a suitable residence for her, and there making preparations for her family, and then he was to return and move her to it; that the

¹ A bailment of goods by A to B, to deliver to C, or for the use of C, gave C, as in the principal case, the right to maintain detinue against B. See Ames, 52n.

Similarly trover will lie. *Flewllin v. Rave*, 1 Bulst. 68; *Jackson v. Anderson*, 4 Taunt. 24; *Jones v. Cole*, 2 Bail. (S. C.) 330.

son took possession of the slaves, for the purposes aforesaid, and, to her astonishment, did not return, nor was he heard of for several years, and was then discovered, by a person employed for the purpose of searching for him, to be living, with the slaves aforesaid, in the state of Tennessee. Some time after his discovery, he removed to the now county of Butler in this state, where he resided until his death, in 1817. That, after his return to Kentucky, he refused to surrender them, when demanded; that they were increased, and are in the possession of said administrators and heirs. They allege that they are fully able to substantiate said facts by proof, and pray that the restoration of the slaves may be decreed, with payment of the hire.

The defendants, in their answer, . . . insist that there is no equity in the bill, and that the remedy is at law. . . . The court below decreed . . . the slaves to be restored, and the hire to be paid. From this decree the administrators and heirs of Ashley appealed.¹

It is now contended that the Chancellor had no jurisdiction of the case, and that the remedy of the appellee is properly at law. On the other side, it is insisted that the claim of the appellants is founded on a trust, and that the son took and held the slaves for the use of his mother, and therefore the Chancellor properly entertained jurisdiction of the case.

It is true that uses and trusts are a favored part of the jurisdiction of the Chancellor, and frequently he will, on that ground, decide in cases where the law may be adequate to give relief. But, notwithstanding this acknowledged authority, it cannot be extended to every case where one party has trusted another, or, in other words, placed a confidence which has been abused. If so, every case of bailment, and every instance of placing chattels by loans or hire, would be swallowed up by courts of equity. Nay, every case where credit was given for debt or duty would soon be drawn into the same vortex. It ought, then, to be confined to cases of controlling legal rights, vested and remaining in trustees, created as such in some proper mode, and not be extended to all cases of abused confidence. If the case, therefore, of the appellee is to be tested by the original bill alone, we have no doubt it makes out no case for the interposition of the Chancellor; that placing the slaves in the posses-

¹ Only so much of the case is given as relates to the point of jurisdiction.

sion of her son, for the purpose of preparing and improving her a home, and his right then to cease, was not such a trust as would sustain the bill, and that she had a plain and adequate remedy at law.¹ . . .

¹ *Young v. Mercantile Co.*, 140 Fed. 61, aff'd 145 Fed. 39; *Taylor v. Turner*, 87 Ill. 296, 301; *Tennessee Packing, etc., Co. v. Fitzgerald*, 140 Ill. App. 430; *Thompson v. Whitaker Iron Co.*, 41 W. Va. 574, *accord*.

Wood v. Rowcliffe, 2 Ph. 382, 3 Hare 304; *Schrafft v. Wolters*, 61 N. J. Eq. 467 [reversed on another ground, 63 N. J. Eq. 793], *contra*.

By the old Teutonic law a bailor's remedy did not extend beyond the bailee. If the bailee bailed or sold the goods, or lost them against his will, the sub-bailee, the purchaser, and even the thief, were secure from any attack by the original bailor. This doctrine persisted for centuries in Germany and France. Heusler, *Die Gewere*, 487; Carlin, *Niemand Kann Einen Anderen Mehr Recht Uebertragen Als Er Selbst Hat*, 42, 48; Jobbé-Duval, *La Revendication des Meubles*, 80, 165. In England the ancient tradition was maintained in the fourteenth century. Y. B. 24 Ed. III, 41, A-22. *Thorpe* (a judge three years later): "I cannot recover against any one except him to whom the charter was bailed"; Y. B. 43 Ed. III, 29-11. *Belknap* (afterwards C. J.): "In the lifetime of the bailee Detinue is not given against any one except the bailee, for he is chargeable for life." See also 3 Harv. L. Rev. 33. [And see Ames, Lect. Leg. Hist. 73, 172 *et seq.*]

Seld. Soc., Sel Cas. in Ch., No. 116 (1413-1417): A son had bailed a coffer containing title deeds and money to his mother before starting for Jerusalem. The mother died during his absence, and her husband, the plaintiff's stepfather, refused to give up the coffer to the son on his return. The son prays for relief in equity saying that "because he (stepfather) was not privy nor party to the delivery of the said coffer to his said wife . . . no action is maintainable against the said J. C. (stepfather) at common law, to the grievous damage to the said J. H. (son) and his final disinherison and destruction, if he be not succoured by your most gracious Lordship where the common law fails him in this case."

It is hardly necessary to add that the conception of a genuine right *in rem* has long been familiar, and that a bailor may now have Detinue or Trover against any subsequent possessor as well as against the bailee. *M'Combie v. Davies*, 6 East 538; *Baehr v. Clark*, 83 Iowa 313; *Galvin v. Bacon*, 11 Me. 28; *Stanley v. Gaylord*, 1 Cush. (Mass.) 536; *Saltus v. Everett*, 20 Wend. (N. Y.) 267; *Wooster v. Sherwood*, 25 N. Y. 278; *Howland v. Woodruff*, 60 N. Y. 73, 79; *Edwards v. Dooley*, 120 N. Y. 540; *Church v. Melville*, 17 Ore. 413. — AMES.

In *Doyle v. Burns*, 123 Iowa 488, the court said (p. 497): "It [the argument] fails to distinguish between a bailment and a trust. We are aware that some very good text-writers have made the same mistake. Story on Bailments, sec. 2; 2 Kent's Com. 559. A bailment exists whenever the ownership and the possession of specific corporeal chattels are lawfully severed from each other. In a trust of personal property, the legal ownership passes to the trustee, and he has something more than bare possession. In cases of bailment the legal ownership is in the bailor, and the bailee simply has pos-

SECTION III.

A Trust Obligation distinguished from a Liability for a Tort.

CHAMBERS v. CHAMBERS.

SUPREME COURT, ALABAMA. 1892.

98 Ala. 454.

MCCLELLAN, J. This bill is exhibited by J. W. Chambers and W. H. Chambers, as the administrators of the estate of Isaac H. Chambers, deceased, against George H. Chambers, Mary A. Chambers and Malinda Chambers, who are, as are also the complainants, heirs at law and children of the intestate. The case made by its averments, is this: Isaac H. Chambers, during his last illness, had at his residence, but in a different room from that in which he lay, a fire-proof combination lock safe, in which he kept a considerable sum of money — about four thousand dollars — some account books, and choses in action, a mortgage evidencing and securing an indebtedness amounting to about twelve hundred dollars of said George Chambers to him, being among the latter. On the forenoon of the day preceding his death, said Mary Chambers, being alone in the room with her father, “asked him for the combination of the safe, stating certain reasons for wanting it; he told her that the paper with the combination on it was in his coat pocket, but refused to let her or anyone else have it before he died.” Afterwards when he fell asleep, said Mary took some papers from his said coat pocket, and complainants assert their belief that the paper containing the combination was among them. On the afternoon of the same day, the said Mary and her brother George Chambers, “went into the room where the safe was, and locked all the doors by which an entrance could be obtained into said room, and, having the combination then in their possession, tried for a long time to unlock the same”; session, which may or may not be for some specific purpose.” See also Maitland, Equity, 45-48.

A safe deposit company or bank is a bailee and not a trustee of securities deposited in a safe deposit box. See *National Safe Dep. Co. v. Stead*, 250 Ill. 584; *Roberts v. Stuyvesant Safe Dep. Co.*, 123 N. Y. 57. See also 9 Harv. L. Rev. 131-143; Ann. Cas. 1912B 441.

On the question whether a bank with which commercial paper is deposited for collection becomes trustee or bailee or debtor, see *infra*, sec. IV.

but failing to do so, they requested Dr. Patterson, who was about leaving the premises, to come into the room and then asked him to "see if he could unlock the combination to said safe," assuring him that they had permission to open it. Patterson then unlocked the safe, and the said George and Mary, in his presence, took therefrom said money, books, papers and mortgage, and put the same in a bag, of which said Mary retained possession. Four or five days after this, and three or four days after the death of Isaac H. Chambers, "the said George and Mary Chambers divided said papers and money as follows: giving the said George Chambers a thousand dollars in money, said mortgage and an account book; to the said Mary Chambers fourteen hundred and eighty dollars in money, and to the said Malinda Chambers twelve hundred dollars in money; and the said Mary Chambers kept possession of a paper which the said Isaac H. Chambers had left in the safe directing how his property should be divided after his death." George Chambers is wholly insolvent. Mary Chambers owns nothing except her interest in said estate, which will not amount to more than four or five hundred dollars. And said Malinda is not worth the amount of twelve hundred dollars; and complainant expresses a fear that she will soon be totally insolvent. At the time of filing the bill, Mary Chambers had spent two hundred and thirty dollars of the money apportioned to her, George had expended five hundred dollars of his share, and Malinda had expended a small part — about seventy dollars — of the twelve hundred dollars, which were allotted to her in the division between the three; and complainants aver that "if they are permitted to keep possession of said money, &c., they will waste and squander the entire sum, and it will be wholly lost to the rest of the heirs of the estate." It is further alleged that the respondents "lay pretended claims to the amounts severally held by them, all of which is entirely false and without foundation," and that complainants "have not an adequate remedy at law, for the reason that said property is kept concealed by the defendants so that it can not be levied upon by any means afforded by a court of law." The prayer is for the appointment of a receiver to take charge of said money, account books, mortgage and papers pending the suit, that an order, be passed requiring the respondents to immediately deliver said property into the hands of the receiver, &c.; that they be required to set forth an account of what of said property

they have disposed of in any way, and a list of the persons to whom they, or either of them have loaned any of said property, and that, upon final hearing, said property be decreed to belong to complainants, as such administrators, as trust funds for the purpose of administration, and that the same be delivered in their hands, &c., &c. Answer on oath was waived.

Respondents demurred to the bill, and assigned the following grounds:

"1. The bill shows a larceny or trespass in taking the money and other things out of the safe of Isaac H. Chambers in his life time, and if complainants had any rights, they have an adequate and complete remedy at law. 2. The bill nowhere alleges any fraud on the part of the defendants whereby a trust might be created. 3. The bill nowhere alleges any confidence or trust reposed in the defendants by Isaac H. Chambers, deceased, to give the complainants, who have no more rights than their intestate would have had, if he had lived, the remedy here invoked. 4. The bill shows on its face that as to the money alleged to have been taken from the iron safe in the life time of Isaac H. Chambers, deceased, if the complainants have any rights as to the money, they had adequate and complete remedy at law. 5. That on the allegations of the bill, it appears that this court has no jurisdiction of the subject-matter about which complaint is made in this bill."

The court overruled this demurrer, and from the decree in that behalf this appeal is prosecuted.

It is insisted for appellees that the facts averred in the bill involve a charge of fraud against the respondents, against which equity will relieve because of the absence of an adequate legal remedy, and also, that on the case made, the respondents are trustees *de son tort* of the money and choses in action in controversy for the estate of Isaac H. Chambers, deceased. Both these contentions are, in our opinion, unsound.

The facts present no case of fraud, but wholly a case of simple trespass or larceny. There was no undue influence resorted to to get possession of the property, no overreaching, no false representations, or fraudulent concealment practised as means of acquiring the possession and control of the money and papers. All that was done as the facts are now stated amounted only to the surreptitious abstraction of the property from Isaac H. Chambers' safe without his knowledge or consent; and surely this can be no more a fraud in legal contemplation than had

the respondents been casual strangers to Chambers, and had unlocked his stable and carried away his horse *animo furandi*.

It is equally clear that the transaction involved no element of an express trust. No trust or confidence was reposed in the respondents by Chambers in respect of this property. George and Mary Chambers secured possession of this property in the life time of the owner, not only without his consent, or knowledge even, but against his expressed wish and purpose. He not only did not intend that they should take the property with the understanding that they should dispose of it in a certain way or hold it for certain purposes, but he did not consent to their possession of it at all. Every material element of an express trust is lacking. Does the transaction involve a *constructive* trust? It is too clear for much discussion that considered as between the respondents and Isaac H. Chambers in his life time, no such trust can be evolved out of the premises. Had the respondents acquired the *title* to this property *by fraud*, they would have been constructive trustees for the benefit of Isaac H. Chambers, while he lived, and for his estate now. But they clearly acquired no *title* to the property *by fraud* or otherwise; they have no title to it now, and have, as we have seen, committed no fraud but rather a trespass or larceny. Clearly too, if the property when they intermeddled with and acquired the possession of it was trust property, they would be held to have taken it subject to the trust and thereby to have made themselves trustees *in invitum*. But at that time the property had no semblance of a trust character. It was simply held and owned by Isaac H. Chambers in his own right and to his own beneficial use. To hold that the respondents by depriving him — not of his title, for that of course remained in him, but — of his possession and use became trustees for his benefit would be to convert all wrongful possessions into trust estates and all persons who tortiously acquire the possession of the property of another into trustees for the owner, a result which finds no support in principle or authority. An essential element of all trusts is a use in a person other than the trustee or rather, since the statute of uses, a trust is a use not executed into a legal estate. Not only was this element wholly wanting in the case as it stood between George and Mary Chambers, on the one hand, and Isaac H. Chambers, on the other, they, on the facts averred, holding this property not to the use of another but for their own benefit and behoof as joint tort feisors, but

for the further essential element of a *title* in them to feed uses, so to speak, is not at all involved. Very clearly they were not trustees to Isaac H. Chambers by construction or otherwise. They simply held the possession of this property at the time of his death as the result of a purely wrongful caption made for their own benefit, and involving no other duties or obligations upon them than would have rested on any other person who had without pretense of right or suggestion of other than ulterior selfish purposes seized or stolen the property in question. Isaac H. Chambers had a clear right to sue them in trover, or in detinue upon identification, but he had no standing in chancery to invoke the execution of a trust; and it will not be contended that his representatives on the facts as now averred, had any other or different rights or remedies than were his while he lived. Had what occurred taken place after his death, had these respondents then intermeddled with the assets of his estate and assumed to dispose of the same by way of administration on his estate, clearly they could be proceeded against as trustees *de son tort*, for such they would have made themselves because of the *then* trust character of the property which would have continued impressed upon it in their hands; but that is not the case made by the bill. Of course the mere fact that complainants' legal remedies would prove abortive because of the insolvency of the respondents can not impart equity to the bill, there must be some ground of equity jurisdiction stated, and that inadequacy of legal remedies which results from the impotency of process out of courts of law can never be a basis for equitable interposition. And we are constrained to hold it to be without equity, and of consequence that the chancellor erred in overruling the demurrer.

It may be that if George and Mary Chambers took possession of the money and papers in the life time of Isaac H. not for the purpose of conversion to their own use simply, or of making such dispositions of it as they would of their own property, but for the purpose of holding it till after his death as his property, and then dividing and distributing it in accordance with written directions left by him, and if they held it in this way and for this purpose till a time subsequent to his death and then assumed to divide and distribute it as assets of his estate that they and Malinda Chambers would, on these facts, be held to be trustees. We do not decide this, however, and have referred to this possible aspect of the case because there is passing state-

ment in the bill which leads us to infer the property may have been taken and held in this way and for this purpose, but, if so, the facts are not averred.

*Reversed and remanded.*¹

SECTION IV.

A Trust distinguished from a Debt or Contract.

SHOEMAKER v. HINZE.

SUPREME COURT, WISCONSIN. 1881.

53 Wis. 116.

APPEAL from the Circuit Court for Waukesha County.

The action is to recover \$40, which the complaint alleges "the defendant received from the plaintiff, as his agent, . . . to the use of the plaintiff." Demand of payment thereof before action, and neglect of the defendant to pay the same, are also alleged. The answer, in addition to the general denial, is in substance that the money was received by the defendant as a bailment, without compensation, and that it was stolen from him without his fault or neglect. The case is further stated in the opinion. The plaintiff recovered, and the defendant appealed from the judgment.

LYON, J. The uncontradicted evidence is, that the plaintiff, when at work for the defendant, requested the defendant to take care of \$40 in money for him. After some hesitation, the defendant consented to do so, and received the money. The defendant thereupon, presumably in the presence of the plaintiff, placed the money, with other money of his own, in his wallet. The next day the defendant took a small amount of money from the wallet for use, and in the evening of that day added \$100 of his own money to that remaining therein. The evidence tends to show that during the same night the wallet and contents were stolen from the defendant's vest pocket, in which he had placed the same. We think the evidence shows conclusively that the parties did not contemplate

¹ On the question whether if one acquires title to a chattel by a tort equity will compel him to reconvey when the legal remedy is adequate, see Ames, Cas. Eq. Juris., 44n.

On the question whether a converter who receives property in exchange for the property converted is a constructive trustee of the property so received, see Ames, Cas. Eq. Juris., 44n. See also *infra*, Chap. IV, sec. VI.

or understand that the same identical money received by the defendant was to be kept for and returned to the plaintiff on demand, but only that a like sum of money should be repaid by the defendant. The transaction is not, therefore, a bailment or special deposit, but rather what, in commercial language, is termed a general deposit, which is not a bailment, but is in the nature of a loan. Story on Bailments, §§ 41, note 2, 88. So we think the liability of the defendant in this case is precisely the same as the liability of a bank for a general deposit made with it; that is, he is not liable in tort for the money, but is liable in *assumpsit* for a sum equal to the sum deposited. His liability is absolute, and it is immaterial that the money was lost without his fault. The instructions to the jury related solely to the law of bailment. The view we take of the case renders it unnecessary to determine whether the judge gave the law correctly or not; for on the undisputed facts the plaintiff was entitled to recover, and the defendant could not have been injured by any error in the charge. *Van Trott v. Weise*, 36 Wis. 439; *Dufresne v. Weise*, 46 Wis. 290.

By the Court. — *The judgment of the circuit court is affirmed.*¹

CITY OF STURGIS v. MEADE COUNTY BANK.

SUPREME COURT, SOUTH DAKOTA. 1917.

38 S. D. 317.

Action by the City of Sturgis, a municipal corporation, against the Meade County Bank, a banking corporation, and J. L. Wingfield, as Public Examiner of the State of South Dakota, [to] establish a preferential claim against defendant bank in favor of plaintiff. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Judgment and order affirmed.

POLLEY, J. The defendant Meade County Bank failed, and was taken in charge by the public examiner, who proceeded

¹ *Chiles v. Garrison*, 32 Mo. 475, *accord*.

But if there is a bailment or trust of money, the deposittee is not liable for its loss, unless he is at fault. See *Doorman v. Jenkins*, 2 A. & E. 256; *Giblin v. McMullin*, L. R. 2 C. P. 317; *Tracy v. Wood*, 3 Mas. (U. S.) 132; *Foster v. Essex Bank*, 17 Mass. 479; *Furber v. Barnes*, 32 Minn. 105; *First Nat. Bk. v. Ocean Nat. Bk.*, 60 N. Y. 278; *Scott v. Nat. Bk.*, 72 Pa. 471; *Duncan v. Magette*, 25 Tex. 245.

to collect the assets and pay the debts. At the time of the failure of the bank, there was on deposit therein a considerable sum of money belonging to the plaintiff, the city of Sturgis. This money had been deposited therein by the city treasurer, and it had been the practice of the city treasurer, for several years prior to the time of the failure, to keep the funds of the city on deposit in said bank, subject to check, and pay the same out by check as needed. This was done with knowledge of the city authorities; and the bank, through its managing officers, knew that the money so deposited by the city treasurer belonged to the city. After the failure of the bank, the city presented its claim for payment, and demanded that it be paid in full in preference to the claims of the other creditors. It is conceded that the assets of the bank were not sufficient to pay its debts in full, but the city claimed that its money constituted a trust fund. The public examiner allowed the amount of the claim, but refused to give it preference over the claims of other creditors. The city brought this action for the purpose of establishing a preference, but the trial court sustained the public examiner, and the city brings the case here on appeal.

[1] When a bank becomes insolvent and is taken over by the public examiner, the assets of the bank become a fund for the payment of the claims of the various creditors, and, unless there is some reason, recognized by law, that entitles one creditor to a preference over the others, they should all be treated alike. If the assets are sufficient in amount, the creditors can all be paid in full; but, where there are not sufficient funds to pay the just claims of all the creditors in full, then such fund as there is should be proportioned among such creditors according to the amount of their respective claims. As between the creditors of an insolvent bank, equality is equity. *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504. This rule applies to all bank depositors.

[2] As a rule, when money is deposited in a bank, title to such money passes to the bank. The bank becomes the debtor of the depositor to the extent of the deposit, and, to that extent, the depositor becomes the creditor of the bank. *Allibone v. Ames et al.*, 9 S. D. 74, 68 N. W. 165, 33 L. R. A. 585. Such deposit then constitutes a part of the assets of the bank, and, in case of insolvency, belongs to the creditors of the bank in proportion to the amount of their respective claims. Exceptions to this rule are: First, where money or other thing is deposited with the understanding that that particular money

or thing is to be returned to the depositor; second, where the money or thing deposited is to be used for a specifically designated purpose; and, third, where the deposit itself was wrongful or unlawful.

[3] The money involved in this case was deposited by the city treasurer subject to his check, and without any understanding that the identical money deposited should be returned to him, or that it should be used for any specific purpose. Therefore it falls within neither of the first two of the above classes. But it is contended by the appellant that the treasurer was without authority to deposit the city funds in the Meade County Bank, or in any other bank; that the law made him custodian of the city funds, and that it was unlawful for him to deposit such funds in any bank, and for that reason the title thereto did not pass to the bank; but that the bank took and held the same as trustee only, and is now in duty bound to return the same in full regardless of the claims of the other creditors.

While the law makes the city treasurer the custodian of the city funds, it does not, either in terms or by implication, require him to maintain the actual or physical possession thereof, nor that he shall keep the same in a private safe or vault. It is customary and altogether proper, in the absence of a law to the contrary, that such funds should be deposited for safe-keeping in some reputable bank, and that they be paid out by check when needed, just as was done by the city treasurer in this case. Where the law prohibits the deposit of specific public funds in banks, it is held by the courts that it is unlawful for the bank to accept the same; that the title to such deposits does not pass to the bank; and, in case of the insolvency of the bank, such deposits shall be allowed as preferred claims and paid in full by the receiver. *Green v. Custer Country*, 8 Idaho, 721, 71 Pac. 115; *Yellowston County v. Bank*, 46 Mont. 439, 128 Pac. 596; *State v. Bruce*, 17 Idaho, 1, 102 Pac. 83, L. R. A. 1916 C, 1, 134 Am. St. Rep. 245. But in this state there is no law that prohibits a city treasurer from keeping the city funds in a bank; and, where such funds are deposited by the treasurer to be paid out on check, the transaction constitutes a general deposit. The relation of debtor and creditor arises in the same manner as in case of the deposit of individual funds. *Alliborne v. Ames*, *supra*. And, in case of insolvency of the bank, the claim of the city, based on a deposit of public funds, is in no wise superior to, or entitled to a preference over,

a claim based on a deposit of individual funds. 5 Cyc. 514, 3 R. C. L. 644, 7 C. J. 633; *Cavin v. Gleason*, *supra*; *Fletcher v. Sharpe*, 108 Ind. 276, 9 N. E. 142; *McLain v. Wallace*, 103 Ind. 562, 5 N. E. 911; *Hunt v. Hopely*, 120 Iowa, 695, 95 N. W. 205; *Brown v. Bank*, 139 Iowa, 83, 117 N. W. 289; *Officer v. Officer*, 120 Iowa, 389, 94 N. W. 947, 98 Am. St. Rep. 365, and, for an extended discussion of this subject, see note appended to *Page Country v. Rose et al.*, 8 Ann. Cas. 116, where the authorities on the subject are collected and reviewed. We believe this is a proper case for the application of the above rule, and we hold accordingly that the deposits involved, made by the city treasurer of the plaintiff city, constitute a general deposit only, and that the city should be treated as a general creditor and be paid ratably from the assets of the bank that are applicable to the payment of the claims of the general creditors.

*The judgment and order appealed from are affirmed.*¹

PITTSBURGH NATIONAL BANK OF COMMERCE
v. McMURRAY.

SUPREME COURT, PENNSYLVANIA. 1881.

98 Pa. 538

Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKEY and STERRETT, JJ. GREEN, J., absent.

ERROR to the Court of Common Pleas No. 1, of Allegheny county: Of October and November Term 1881, No. 9.

Assumpsit, by George W. and William McMurray against the Pittsburgh National Bank of Commerce, to recover the sum of \$1,300.

¹ See *Hawkins v. Cleveland, etc., Ry. Co.*, 89 Fed. 266; *Officer v. Officer*, 120 Iowa 389; *Phillips v. Bank*, 98 Kan. 383; *Kendall v. Fidelity T. Co.*, 230. Mass. 238; *Paul v. Draper*, 158 Mo. 197; *State v. Thomas*, 53 Neb. 464; *Prov. Inst. v. Dailey*, 22 R. I. 239; *United States F. & G. Co. v. Home Bank*, 77 W. Va. 665; *Henry v. Martin*, 88 Wis. 367; 5 L. R. A. (N.S.) 886; 16 L. R. A. (N.S.) 918; L. R. A. 1917A 683. See *Bischoff v. Yorkville Bk.*, 218 N. Y. 106, *post*.

In general, as to the relation between a commercial bank and a general depositor, see *Ames*, 29n. The leading case is *Foley v. Hill*, 2 H. L. C. 28. See also *Manhattan Co. v. Blake*, 148 U. S. 412; *Collins v. State*, 33 Fla. 429; *Bayer v. American T. & S. Bk.*, 157 Ill. 62; *State v. Bartley*, 39 Neb. 353; *Bank v. Brewing Co.*, 50 Oh. St. 151; *Leaphart v. Commercial Bank*, 45 S. C. 563.

On the trial, before COLLIER, J., the following facts appeared: The plaintiffs, who lived in Noblestown, had been in the habit for several years of sending money to S. B. W. Gill, an attorney-at-law in Pittsburgh, as their agent and attorney, for the purpose of investment, on the understanding that Gill was to pay interest on the money from the time he received it until he invested it. On September 17th, 1877, the plaintiffs sent the sum of \$1,300 to Gill's office, with a message that it was for investment. Mr. Gill was absent from the city, and the money was left with his son and business assistant, who gave the following receipt:—

“Received, Pittsburgh, September 17th, 1877, of George W. and W. McMurray, the sum of thirteen hundred dollars, to be invested by me for them.

S. B. W. GILL,
H. B. GILL.”

The standing arrangement that Gill was to pay interest on such funds until invested was not countermanded or alluded to. H. B. Gill, on the same day, deposited this sum in the defendant bank, to the credit of his father's general private account. Subsequently he drew from the bank, on blank checks left with him and signed by his father, sums exceeding \$1,300.

Two months afterwards, it being currently rumored that S. B. W. Gill was a defaulter and had absconded, the plaintiffs demanded the sum of \$1,300 from the bank, on the ground that it was trust money belonging to them. At this time the balance to Gill's credit was \$1,954. The bank refused the demand. On the same day a writ of sequestration, issued from the Orphans' Court, was served upon the bank, and the said balance standing to Gill's credit, was paid to the sheriff, who afterwards, under an order of the Orphans' Court, paid the same to Gill's assignee in bankruptcy. The plaintiffs afterwards brought this suit.

The bank alleged that they had an agreement with Gill that he was to keep a large balance on deposit to secure a line of discounts; that they received the \$1,300 as Gill's money, without notice of any trust; and that, in fact, the transaction between the plaintiffs and Gill was a loan and not a trust.

The defendant presented, *inter alia*, the following point: “(5) If the jury find that the money in question was sent to S. B. W. Gill for investment under the same arrangement as

he had before that time received other moneys from plaintiffs for investment, to wit, under an arrangement that he (Gill) was to pay interest to the plaintiffs until the money should be invested, then the verdict should be for the defendant. And if the fact was as stated by Wm. McMurray, one of the plaintiffs, that such arrangement was not countermanded when they sent the money claimed in this case to Gill, the presumption would be that the same arrangement was to continue in respect to said money as had been agreed upon before that time in respect to other moneys placed by plaintiffs in Gill's hands for investment." *Refused.* Exception.

Verdict and judgment for the plaintiffs. The defendant took this writ, assigning for error, *inter alia*, the refusal of the above point.

Mr. Justice PAXSON delivered the opinion of the court, October 24th, 1881.

The defendant's fifth point ought to have been affirmed. If, as was alleged, the money was placed in Gill's hands for investment, with an understanding or agreement that until he could find a satisfactory mortgage he should pay interest thereon, the plaintiffs below cannot hold him as a trustee, nor follow his deposit in the bank as trust money. As the court below negatived the point, we must assume the jury would have found the facts as stated therein. The plaintiffs cannot treat Gill in the dual character of trustee and debtor. Undoubtedly the receipt by him of the money for investment, without more, would have made him a trustee. The money would have been trust money, and if misapplied, could have been followed until it reached the hands of an innocent holder for value. But the agreement to pay interest necessarily implied the right to use the money. Interest is the price or consideration for the use of money. It follows that Gill became the mere banker or debtor of the plaintiffs, subject to the duty of investing the money in a mortgage when a suitable opportunity should occur. In the meantime he had the right to use it in any way his convenience or necessities required. When deposited in the bank, it was the money of Gill, not of the plaintiffs, if the facts be as stated in the point.

The remaining assignments are without merit.

*Judgment reversed, and a venire facias de novo awarded.*¹

¹ *Wetherell v. O'Brien*, 140 Ill. 146, *accord*.

TUCKER v. LINN.

COURT OF CHANCERY, NEW JERSEY. 1904.

57 Atl. 1017.

SUIT by Ethel L. Tucker against Clarence Linn, individually and as administrator of John Linn, deceased, and others. Bill dismissed.

STEVENSON, V. C. (orally). The complainant in her bill charges that between and during the years 1895 and 1898 the complainant "placed the sum of \$1,840 in the hands of the defendant John Linn for investment in such securities as he might deem safe, and for the care, custody, management, and control for her of such securities after the investment of the said money; that the said John Linn, acting as attorney of and trustee for the complainant, thereupon took the entire charge of said moneys and investments until the death of the said John Linn, which occurred in the year 1898; that at the time of his death the said John Linn had in his possession, as attorney as aforesaid, and held in trust for the complainant, the said sum of \$1,840, or the securities representing the same, together with the accrued interest or dividends thereon." I think that quotation from the bill sufficiently indicates what the cause of action is which the complainant sets forth. She failed to procure any of this trust estate from Mr. Linn in his lifetime. She says that she has failed to procure any of it since his death from his administrator, the defendant Clarence Linn. In my opinion, there is an entire failure of proof of that perfectly plain, simple, correctly stated, equitable cause of action. No doubt the counsel of complainant was disappointed at the rulings of the court with respect to the competency of the complainant to testify herself in this cause in regard to statements by the deceased, John Linn, or personal transactions with the deceased, John Linn. The proof which was presented and allowed to be competent indicated that at some time — probably in the year 1894 — John Linn received \$1,000 from the complainant. It was also proved that from 1893 until April, 1898, the time of the death of John Linn, the complainant acted in the capacity of working housekeeper, and that her services as such were not gratuitous. Whether she was paid for those services or not did not appear. That she rendered the services

was perfectly plain, and that they were not rendered gratuitously was also plain. But here the proof stops, and the insistment is on the part of the complainant that \$840 of those earnings were retained by Mr. Linn, and under an arrangement or understanding that he would pay interest — a better interest for the amount than the complainant could receive from the banks. Now, I am not going to deal with the question whether the fact of the payment of the \$1,000 in 1894 or thereabouts was proved, or whether it was proved that any moneys due from Mr. Linn to the complainant as wages were retained by him, and remained unpaid by him at the time of his death. The answer sets up three defenses. The answer insists that the complainant has a complete remedy at law, and that she has no standing in a court of equity to prosecute her claim. The answer, in the next place, pleads the statute of limitations. I may not state the order of these defenses correctly. And then, last of all, denies the existence of the indebtedness. As I recall it, it denies that John Linn ever received the said sum of \$1,840, or any sum, from the complainant, and denies that John Linn at the time of his death owed the complainant anything. It seems to me that, if the evidence is to be construed most favorably to the complainant, if it be conceded that John Linn received this \$1,000, and also owed the complainant some amount of money for wages earned by her, and which he had not paid at the time of his death, the demand of the complainant is cognizable in a court of law, and not cognizable in equity. In my judgment, there is an entire failure, as I said before, to prove this particular equitable cause of action which is set forth in the bill of complaint. Undoubtedly, the cause of action set forth in the bill is one of which this court has full cognizance. That cause of action involves a perfectly simple and well-settled trust. The charge is that particular money was paid over by the complainant to the defendant's intestate to be invested in securities, and these securities were to be held by the defendant's intestate. No equitable title to the money passes in such a case. No equitable title to the securities in any way exists in the holder. If this bill had been proved to be true, then John Linn received money which he had no right to appropriate to his own use. He did not, by receiving the money, become a debtor to the complainant. He was charged with the duty of expending these moneys for securities or investing them in securities, and when he did so the equitable title to those securities would be

in the complainant, and he would be the mere trustee, not having any beneficial ownership.

Now, it seems to me that, even if this bill could be amended so as to make its allegations correspond with the proofs, and the proofs are to be taken most favorably to the complainant, as I am undertaking to do, then we have a transaction, or series of transactions, which resulted in creating the relation of debtor and creditor between these people, pure and simple. The money, whether you take the \$1,000 or take any portion of these wages that were earned — the money received or retained by John Linn — according to the bargain between these two persons, was to be appropriated by John Linn; was to become his own property, his own estate. He could expend it, do with it as he pleased. He was not to hold that money in specie as a deposit for the benefit of the complainant, who trusted him with it, in which case one kind of a trust would exist; and he was not to pay it out for her use; and he was not to invest it in securities, and then hold the securities for her, the legal title to which would be in him and the equitable title to which would be in her. He was to appropriate that money, and pay her back, either on demand or at some future time, other money, equivalent to what he had borrowed, presumably, plus interest thereon. Now, whenever you have that kind of a transaction, you have a case of legal indebtedness, and you cannot have any trust. There is a great deal of vague thought, I think, in some of the books arising from overlooking the essential element of a trust. There can be no trust unless you have property held by one person for the benefit of somebody else. You may have confidential or fiduciary relations, as they are called, and you can have situations in which these equitable words are employed which relate to trusts. But in order to the existence of a trust you must have property which is held by one person, as I have said, for the benefit of somebody else. The essential element of the trust is the division of the title between the legal and the equitable title. You have no such situation where you have the relation of debtor and creditor. The man who borrows money appropriates the money, and the lender means that he shall. He does not take that money to hold it in trust for the lender. He takes it for himself. And upon the facts which the complainant may claim in this case a bill in equity, in my judgment, is no more appropriate than it would be for a depositor,

so called, of money in a bank, to file a bill in the court of chancery against the bank to recover his debt.¹ . . .

I do not find in this case that the parties did use any terms which indicate anything more than an ordinary contract of borrowing and lending. The employer often says to his employé "Well, let me keep your wages." "Keep" is the word commonly used. "Keep" is the word that is proved here to have been used by Mr. Linn — "Let me keep your wages, and I will pay you interest; better interest than you can get in the bank." That does not indicate any trust relation. It does not indicate that the employer is receiving the fund in trust to invest for the employé. Nothing of the kind. It indicates that the employer is borrowing money. He is enabling his employé to lend him money at a higher rate than he can get at the bank. It is a very common thing. And so with all the other words that were employed. I followed the witnesses very closely, and I have since to some extent reviewed the testimony. I do not find that there is any language that indicates that Mr. Linn at any time assumed any other relation than that of debtor to the complainant. I think, therefore, that on that ground alone the bill should be dismissed — on the ground that the court has no jurisdiction. . . .

HAMER v. SIDWAY.

COURT OF APPEALS, NEW YORK. 1891.

124 N. Y. 538.

PARKER, J. The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that "on the 20th day of March, 1869, . . . William E. Story agreed to and with William E. Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age then he, the said William E.

¹ The learned Vice-Chancellor here discussed *Gutch v. Fosdick*, 48 N. J. Eq. 353, and *Agens v. Agens*, 50 N. J. Eq. 566. See also *Upshur v. Briscoe*, 138 U. S. 365; *Kribs v. People*, 82 Ill. 425; *Kershaw v. Snowden*, 36 Oh. St. 181.

Story, would at that time pay him, the said William E. Story 2d, the sum of \$5,000 for such refraining, to which the said William E. Story, 2d, agreed," and that he "in all things fully performed his part of said agreement."

The defendant contends that the contract was without consideration to support it, and, therefore, invalid.¹ . . .

In further consideration of the questions presented, then, it must be deemed established for the purposes of this appeal, that on the 31st day of January, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of \$5,000, and if this action were founded on that contract it would be barred by the Statute of Limitations which has been pleaded, but on that date the nephew wrote to his uncle as follows:

"DEAR UNCLE — I am now 21 years old to-day, and I am now my own boss, and I believe, according to agreement, that there is due me \$5,000. I have lived up to the contract to the letter in every sense of the word."

A few days later, and on February sixth, the uncle replied, and, so far as it is material to this controversy, the reply is as follows:

"DEAR NEPHEW — Your letter of the 31st ult. came to hand all right saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have \$5,000 as I promised you. I had the money in the bank the day you was 21 years old that I intended for you, and you shall have the money certain. Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. . . . This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. . . .

W. E. STORY.

"P. S. — You can consider this money on interest."

The trial court found as a fact that "said letter was received by said William E. Story, 2d, who thereafter consented that said money should remain with the said William E. Story in

¹ A part of the opinion holding the contract to be valid is omitted. The statement of facts is also omitted.

accordance with the terms and conditions of said letter." And further, "That afterwards, on the first day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred and assigned all his right, title and interest in and to said sum of \$5,000, to his wife Libbie H. Story, who thereafter duly sold, transferred and assigned the same to the plaintiff in this action."

We must now consider the effect of the letter, and the nephew's assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee and *cestui que trust*? If the former, then this action is not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler's intention is sufficient if the property and disposition of it are definitely stated. (Lewin on Trusts, 55.)

A person in the legal possession of money or property acknowledging a trust with the assent of the *cestui que trust*, becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls. (2 Story's Eq. §972.) If before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands and stipulating for its investment on the creditor's account will have the effect to create a trust. *Day v. Roth*, 18 N. Y. 448.

It is essential that the letter interpreted in the light of surrounding circumstances must show an intention on the part of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it, we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. *White v. Hoyt*, 73 N. Y. 505, 511. At the time the uncle wrote the letter he was indebted to his nephew in the sum of \$5,000, and payment had been requested. The uncle, recognizing the indebtedness, wrote the nephew that he would keep the money until he deemed him capable of taking care of it. He did not say "I will pay you at some other time," or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had "earned" for him so that when he should be capable of taking care of it

he should receive it with interest. He said: "I had the money in the bank the day you were 21 years old that I intended for you and you shall have the money certain." That he had set apart the money is further evidenced by the next sentence: "Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it." Certainly, the uncle must have intended that his nephew should understand that the promise not "to interfere with this money" referred to the money in the bank which he declared was not only there when the nephew became 21 years old, but was intended for him. True, he did not use the word "trust," or state that the money was deposited in the name of William E. Story, 2d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept without interference until he should be capable of taking care of it, for the uncle said in substance and in effect: "This money you have earned much easier than I did . . . you are quite welcome to. I had it in the bank the day you were 21 years old and don't intend to interfere with it in any way until I think you are capable of taking care of it and the sooner that time comes the better it will please me." In this declaration there is not lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented.

The learned judge who wrote the opinion of the General Term, seems to have taken the view that the trust was executed during the life-time of defendant's testator by payment to the nephew, but as it does not appear from the order that the judgment was reversed on the facts, we must assume the facts to be as found by the trial court, and those facts support its judgment.

The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate.

All concur.

*Order reversed and judgment of Special Term affirmed.*¹

¹ See *Re Tidd*, [1893] 3 Ch. 154; *Wright v. Paine*, 62 Ala. 340; *Greenfield Sav. Bk. v. Abercrombie*, 211 Mass. 252, 259.

At common law a claim against an express trustee to recover the trust property, or in respect of a breach of trust, is not barred by any Statute of Limitations. This rule was expressly affirmed by the Judicature Act, 1873 (36 & 37 Vict. c. 66) sec. 25 (2). But claims against express trustees may be barred by acquiescence or laches. *Bright v. Legerton*, 2 De G. F. & J. 606. There are many American cases holding that a claim against an express

PEOPLE v. MEADOWS.

COURT OF APPEALS, NEW YORK. 1910.

199 N. Y. 1.

GRAY, J. The defendant was indicted for the crime of grand larceny in the first degree. The charge in the indictment, in substance, was that, on the 22nd day of May, 1908, at the city of Buffalo, the defendant, as the servant, bailee, or agent, of one William E. Silverthorne, had in his possession and custody \$72,012.50, the property of said Silverthorne, and that he, thereafter, with the intent to deprive and defraud the said Silverthorne of the said moneys, did, feloniously, steal the same. Upon being brought to trial, the defendant was found guilty by the jury and the judgment of conviction has been affirmed at the Appellate Division. The indictment was found under subdivision 2 of section 528 of the Penal Code; which includes, under the offense of larceny, the offense, formerly, known as embezzlement. That form of larceny required that the People, to support a conviction, should establish, in this case, that the moneys were delivered to the defendant as the bailee, or agent, of their owner and that he had, intentionally, appropriated the same to his own use, or to that of any other person than the owner.

The evidence upon the trial was such as to justify the verdict rendered by the jurors and by that verdict the following facts must be deemed to have been established. The defendant was a member of the firm of Meadows, Williams & Company, a firm

trustee who has openly repudiated or disavowed the trust may be barred by laches or by the Statute. Wood, Limitations, 4 ed., chap. 20; 13 Ann. Cas. 1165; Ann. Cas. 1917C 1018. And a claim against a constructive trustee or a trustee who is such only in a broad and general sense and against whom there is a concurrent legal remedy may be barred. See *Hovenden v. Annesley*, 2 Sch. & Lef. 607; *Soar v. Ashwell*, [1893] 2 Q. B. 390; *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90. And by the Real Property Limitation Act, 1833 (3 & 4 Will. IV. c. 27) sec. 25, a claim against a transferee of trust property is barred in 20 years, reduced by the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57) sec. 8, to 12 years.

The English law as to express trusts was changed by the Trustee Act, 1888 (51 & 52 Vict. c. 59) sec. 8, which provides that in certain cases claims against express trustees shall be barred by the Statute of Limitations. See *North Amer. etc. Co. v. Watkins*, [1904] 1 Ch. 242, [1904] 2 Ch. 233; *Re Fountaine*, [1909] 2 Ch. 382; *Maitland, Equity*, 176-179.

engaged in a general brokerage business in the city of Buffalo, and, at the time of the transaction in question, was the active member in charge of the business. The complainant, Silverthorne, had been a customer of the office and, upon several occasions, had made investment purchases of securities. On May 20th, 1908, he came to the office and ordered the defendant to purchase 700 shares of the preferred stock of the United States Steel Corporation, at the price of 102 $\frac{3}{4}$. He told the defendant that he was buying for investment and that he wished the stock to be placed in his, Silverthorne's, name. He knew that the stock was to be purchased on the New York market. Defendant's correspondents in that city were Post & Flagg and a private wire connected the two offices; but the relation between the two firms was no other than that of a correspondence for the doing of business for the one, or the other, as the case might be. The quotations, upon which Silverthorne gave his order, were procured from Post & Flagg and they were given the order by the defendant to buy the stock. The next day the defendant sent Silverthorne a "memorandum," to the effect that his firm had "bought 700 U. S. Steel pfd. at 102 $\frac{3}{4}$ " and showing the cost, with commissions, to be the sum of \$72,012.50. Accompanying the memorandum was a letter from the firm, which, after stating the purchase, further, stated as follows: "This account received by telegraph from New York. Names of parties from whom purchase was made will be given if desired as soon as advices are received by mail." The next day, upon receiving this letter and memorandum of account, Silverthorne mailed to the defendant his check for the \$72,012.50; the receipt of which the defendant acknowledged by the return of the memorandum receipted. This check was deposited to the general account of the firm in their bank. Upon occasions, during the next few days, when Silverthorne called to know if his stock had arrived, he was told, in explanation of its non-arrival, that the delay was caused through the transfer office being closed. Silverthorne, being then on the eve of his departure for Europe, requested the defendant, as the stock was to be in his name, to keep it for him until his return; which the defendant agreed to do. When Silverthorne's check was received, the firm's bank account showed a credit of only \$1,500 and the same day, and on days following, the defendant drew upon it, as so increased by the funds received from Silverthorne, in payment of the demands of creditors; individual as well as firm. Pay-

ment was never made by defendant to Post & Flagg for the stock; no payment was ever, specifically, made upon account of its purchase and the shares of stock were never taken up from Post & Flagg. The course of dealings between that firm and the defendant's appears to have been for the former concern, upon executing orders given by the latter, to carry all securities upon marginal account, and these 700 shares of stock were bought, and were being carried, for the defendant's firm in that way. They knew no one in the transactions but defendant's firm; which, alone, was their customer. Payments were made to Post & Flagg, subsequently to the execution of Silverthorne's order, to which, largely, the proceeds of Silverthorne's check contributed; but they were made upon the general marginal account, which the New York firm was carrying. Within three months of this transaction, the members of defendant's firm were adjudged bankrupts, with liabilities very greatly in excess of their assets, and that was the situation which Silverthorne found, upon returning from Europe in September. Neither defendant's firm, nor the trustee in bankruptcy, had received the shares of stock, for the purchase of which Silverthorne had furnished the former the moneys in question.

It seems to me that this was as plain a case, as could be imagined, of embezzlement within the statutory definition of that form of larceny. The defendant's firm, in this transaction with Silverthorne, acted as his agent and, as such, their duty was to use the money intrusted to them in payment for the stock purchased on his order. They had no discretionary power over the fund whatever. Silverthorne had no general account with them. Brokers are but agents for those who employ their services and the terms of the agency define and govern the nature and scope of the agent's powers. The terms of the agency undertaken by the defendant, neither directly, nor by implication, authorized the doing of any acts, beyond such as were necessary to effect the purchase of, and the payment for, the particular kind and number of shares of stock. For the effectuation of the purpose of the agency, these moneys were delivered to the defendant's firm. There was no other purpose, which Silverthorne had to subserve in sending them this sum of money.

Of course, the moneys came lawfully into defendant's possession and therein lies the distinction between the embezzlement, of which the defendant was guilty, and the common-law

form of larceny; in which latter offense, the intent to misappropriate must have existed at the inception of the transaction, in which the property was obtained. Where the offense consists in the appropriation by an agent, a bailee, a trustee, or an attorney, of the property of the owner, the felonious intent need only exist at the time of the appropriation; for, in such a case, the property stolen would have been properly in the possession of the defendant. *People v. Moore*, 37 Hun 84. The criminal act in this case was committed, and the criminal intent evidenced, when, departing from his duty to use the moneys in paying for the stock, the defendant diverted it to other purposes. Evidence of a criminal intent to defraud Silverthorne of his property was not wanting. The firm was heavily involved, the pressure of debt very great and the bank balance very low. The jurors were warranted in inferring that the defendant yielded to the temptation of relieving the pressure by diverting the funds received from Silverthorne to his own purposes; hoping, if not believing, that, during the latter's absence from the country, an opportunity might be afforded for restoration. A deliberate diversion of the moneys being shown, it required but slight evidence in the facts and circumstances to satisfy the jurors as to the existence of the felonious, or criminal, intent. His expectation, or intention, of restoring the moneys so diverted, of course, was of no avail. (Penal Code, section 549.)

The argument that the relation of debtor and creditor existed is quite untenable. Not only did the defendant's firm have no funds to the credit of Silverthorne in general account, at the time; but the verdict establishes the truth of his evidence that he intrusted the moneys in question to them for the specific purpose of paying for the stocks he had ordered to be bought and of causing their transfer into his name.

The answer to the appellant's argument, that the title to the stocks was in Silverthorne and that the relation of pledgor and pledgee existed between him and appellant's firm, is that the verdict has established the fact to be that, immediately upon being notified of his order having been executed, he remitted the amount representing the cost of the stocks. He had no general account with the firm. His check went to discharge his whole liability and if the moneys had been faithfully forwarded to New York, as the defendant was bound to do, the title to the stocks would have been perfected in him.

The dissent below is based upon a mistaken view of the effect of the defendant's acts, if not of the facts themselves. The criminal act charged was not in depositing the check to the credit of the firm account in the bank; it was in the misapplication, thereafter, of the funds, with which Silverthorne had provided defendant's firm through the check, by appropriating them to other uses than in payment for the stocks. In this form of larceny, it is assumed that the property stolen comes properly into the possession of the party appropriating it. When the check went to swell the bank account of defendant's firm, the fact that the relation of debtor and creditor then arose between the bank and its depositor in no wise changes the fact that the firm was in possession of Silverthorne's property as his agent for a particular purpose. They were not obliged to segregate it by a separate deposit; they were obliged, having it in their possession, to at once appropriate it to the purpose for which received. . . .

CULLEN, Ch. J., VANN, WERNER, WILLARD BARTLETT, HISCOCK and CHASE, JJ., concur.

*Judgment of conviction affirmed.*¹

¹ The defendant being allowed, in the following cases, to use as his own the money received, and becoming thereby a debtor, was not an embezzler: *Kribs v. People*, 82 Ill. 425 (borrower); *Mulford v. People*, 139 Ill. 586 (borrower); *Comm. v. Stearns*, 2 Met. 343 (auctioneer or factor); *Comm. v. Libbey*, 11 Met. 64 (general collection agent); [*State v. Karri*, 51 Mont. 157, L. R. A. 1916F 90]; *Miller v. State*, 16 Neb. 179 (selling agent, special agreement); *Webb v. State*, 8 Tex. App. 310 (selling agent, special agreement); *State v. Covert*, 14 Wash. 652 (agent for a laundry).

In the following cases the defendant, not being allowed to use as his own the money received, was guilty of embezzlement: *Wallis v. State*, 54 Ark. 611 (attorney); *Haupt v. State*, 108 Ga. 64; *Comm. v. Tuckerman*, 10 Gray, 173 (treasurer of corporation); *Comm. v. Smith*, 129 Mass. 104 (special agent for collection); *Comm. v. Moore*, 166 Mass. 513 (treasurer of corporation); *People v. Converse*, 74 Mich. 478 (attorney); *People v. Karste*, 132 Mich. 455 (stockbroker); *People v. Birnbaum*, 114 N. Y. App. Div. 480 (attorney); *State v. Maines*, 26 Wash. 160 (agent to sell). — AMES.

By the weight of authority stock purchased by a broker for a customer is held by the broker as trustee or pledgee. *Richardson v. Shaw*, 209 U. S. 365; *Thomas v. Taggart*, 209 U. S. 385; *Gorman v. Littlefield*, 229 U. S. 19; *Duel v. Hollins*, 241 U. S. 523; *Cashman v. Root*, 89 Cal. 373; *Skiff v. Stoddard*, 63 Conn. 198; *Brewster v. Van Liew*, 119 Ill. 554; *Markham v. Jaudon*, 41 N. Y. 235; *Wynkoop v. Seal*, 64 Pa. 361. But see *contra*, *Furber v. Dane*, 204 Mass. 412.

In many jurisdictions one who receives property as a fiduciary and appropriates it to his own use, is liable to arrest in a civil action. A factor, auctioneer, agent to sell or buy or collect or the like, is such a fiduciary, in the

Ex parte BROAD. *In re* NECK.

COURT OF APPEAL. 1884.

13 Q. B. D. 740.

THIS was an appeal from an order made by Mr. Registrar Hazlitt on the 24th of April, 1884, directing the trustee in the liquidation of J. F. Neck to pay J. Thomsen, of Bergen, in Sweden, out of the assets of the debtor, the sum of 450*l.*, being the amount of a draft drawn by Thomsen on Westenholz Brothers, of London, dated the 13th of July, 1883, payable at sight, and which was remitted by Thomsen to Neck for the purpose of taking up a bill of exchange drawn by Thomsen on Neck, dated the 19th of April, 1883, and accepted by Neck.

Neck had carried on the business of a foreign banker and merchant in the city of London. Thomsen carried on business at Bergen, in Sweden, as a merchant, under the firm of Gottlieb Thomsen. For some years Neck had been in the habit of accepting for the accommodation of Thomsen bills drawn on him by Thomsen. The course of business was thus described in an affidavit made by Thomsen: "For some years past I have been accustomed from time to time to draw bills upon Neck at three months date, which he has accepted, and before the due dates of such bills it has been my invariable custom to remit funds to Neck to cover my drafts as they respectively matured." Thomsen further said: "On the 19th of April, 1883, I drew a bill for 450*l.* on Neck, payable to the order of Bergen's Private Bank, at three months date, which bill was accepted by Neck and was made payable at his bankers in the city of London. The said bill matured on the 21st of July, 1883 (the 22nd of that month falling on a Sunday). On the 13th of July, 1883, I remitted to Neck a draft for 450*l.*, upon Westenholz Brothers absence of an agreement with his principal allowing him to appropriate. See Ames, 27*n.*

Under various bankruptcy statutes, including the present Bankruptcy Act of the United States, it is held that a defaulting factor, auctioneer or agent does not come within a clause denying a discharge in the case of a "defalcation while acting . . . in any fiduciary capacity." Crawford *v.* Burke, 195 U. S. 176; American etc. Co. *v.* Berry, 110 Me. 528, Ann. Cas. 1915A 1295; Ames, 28*n.*

A similarly narrow construction has been given to some other statutes relating to trustees. Tiedeman *v.* Imperial etc. Co., 109 Ga. 661. See also Southern etc. Co. *v.* Cleghorn, 59 Ga. 782.

of London, at sight, which I am informed and believe was received by Neck on the 17th of July, 1883. I am also informed and believe that the draft upon Westenholz Brothers was accepted by that firm, and was paid by Neck to his account with his bankers on the day it was received, and that it was duly collected."

On the 20th of July, 1883, Neck stopped payment, and, when the bill for 450*l.* which he had accepted was presented the next day to his bankers for payment, payment was refused.

Neck made an affidavit in which he said: "Thomsen was well aware from time to time, when he remitted to me bills to meet my acceptances on his account and for his accommodation, that I was in the habit of discounting such bills remitted by him, although, as a matter of fact, I sometimes did not discount such bills forthwith, but retained the same until it was convenient to me to discount them. In any event it was the arrangement between us that I should debit him with interest at the rate of 5 per cent. per annum in respect of moneys paid by me for the purpose of paying my credit acceptances as aforesaid, and credit him with interest at the same rate, from the due dates of any remitted bills, in respect of any moneys which were the proceeds of bills remitted by him. It was my custom to render accounts to Thomsen annually, and such accounts were made up to the 31st of December in each year, and the balance of interest was either debited or credited, as the case might be, in the accounts so rendered."

Neck's books shewed that the accounts between himself and Thomsen were kept in the manner thus described.

The letter, dated the 13th of July, 1883, in which Thomsen sent to Neck the bill for 450*l.* on Westenholz Brothers, contained the following passage: "Inclosed I beg to remit 450*l.* at sight on Westenholz Brothers, which please encash to my credit." In a letter, dated the 18th of July, 1883, written by Neck to Thomsen, he said: "We are in receipt of your favour of the 13th inst. handing a cheque for 450*l.* for 17th inst. on Westenholz Brothers, which is noted to the credit of your account. In the book of "bills receivable" kept by Neck, the bill on Westenholz Brothers was entered as received on Thomsen's account. On the 14th of November, 1883, Neck filed a liquidation petition, under which his creditors resolved on a liquidation by arrangement and appointed a trustee.

The trustee appealed from the Registrar's order.

COTTON, L. J.¹ I also am of opinion that the appeal must be allowed. We have to deal with the proceeds of a remittance made by the customer to the debtor which had been cashed before the debtor's stoppage, not with a bill which remained in specie at the time when the stoppage took place. If the bill had remained in specie, the matter would have stood upon a very different footing, and, though it is not necessary to decide the point, probably the customer might then have been entitled to say, "That is my bill; I have paid your acceptance, therefore hand over the bill to me."² But what really took place was this. A few days before the stoppage the debtor cashed the bill, and now the customer says, "I am entitled to follow the proceeds, as trust-money specifically appropriated to a purpose which has not been performed, and therefore the money ought to be handed over to me." In my opinion he is not so entitled. We find that the course of dealing was this. Although the remittances were made by the customer for the purpose of meeting the debtor's acceptances on his account, yet the debtor cashed or discounted the remittances which were made to him, and carried the proceeds to the general account of the customer, and credited the customer with interest on the sums which he had thus received in respect of the remittances.

Now in *In re Gothenburg Commercial Co.*, 29 W. R. 358, Sir G. Jessel, M.R., said, at p. 360, "The bills were sent, I think, originally for the purpose generally of providing funds to meet the acceptances, and for no other purpose, with this right of discounting and appropriating the money." If a man pays interest for money he must be entitled to the use of it. When a man locks up money which is intrusted to him in a box, he does not pay interest on it. I think we must judge of the contract between the parties from the course of dealing and from the accounts which were rendered, and, looking at the whole course of dealing, in my opinion, although, so long as the remittance remained in specie, the customer might have said, "Hand it over to me," yet, looking at the accounts rendered from time to time, the inference is, that the banker was to be at liberty to put himself in funds by cashing the remittances, and, when he had done so, to treat himself, not as a trustee of the proceeds for the customer, but only as a debtor to the cus-

¹ Concurring opinions of Lindley and Baggallay, L. JJ., are omitted.

² *Hassall v. Smithers*, 12 Ves. 119; *Ex parte Gomez*, 10 Ch. 639; *Re Gothenburg*, 29 W. R. 358; *Ex parte Dever*, 14 Q. B. D. 622, *accord.* — AMES.

tomers for the sum which he had thus received. In my opinion, interest being from time to time carried to the credit of the customer in the account, the banker was entitled to put the proceeds into his own pocket, not keeping them separate from his general account.

In my opinion, therefore, as regards the proceeds of this bill which was cashed before the stoppage, the customer must come in and prove as a creditor, and I cannot say that the debtor was a trustee of the money for him. I cannot see any distinction between the present case and *In re Gothenburg Commercial Co.*

*Appeal allowed.*¹

MOORE v. DARTON.

CHANCERY. 1851.

4 De G. & Sm. 517.

THIS was an administration suit, which now came on to be heard upon exceptions to the report of the Master; and the question was, whether the delivery of two documents constituted a *donatio mortis causa*. The testatrix had advanced to William Moore, one of the plaintiffs, 600*l.*, and had taken from him upon that occasion the two documents in question signed by him, and which were as follows:

"Received the 22nd of October, 1843, of Miss Darton Five Hundred Pounds, to bear interest at 4 per cent. per annum, but not to be withdrawn at less than six months' notice.

"£500.

"WILLIAM MOORE."

"Received the 22nd of October, 1843, of Miss Darton, for the use of Ann Dye, One Hundred Pounds, to be paid to her at Miss Darton's decease, but the interest at 4 per cent. to be paid to Miss Darton.

"£100.

"WILLIAM MOORE."

"(I approve of the above) BETTY DARTON."

The transactions relied upon as constituting the *donatio mortis causa* took place on June the 28th, 1845, between Miss

¹ See *Bent v. Puller*, 5 T. R. 494; *Bolton v. Puller*, 1 B. & P. 539; *Re Gothenburg Co.*, 29 W. R. 358; *Ex parte Dever*, 14 Q. B. D. 611, 622. — AMES.

Darton and Ann Dye, who was mentioned in the second memorandum, and who was Miss Darton's lady's maid.¹ . . .

Miss Darton died ten days afterwards.

The Master found, that the 600*l.* was an outstanding debt from the plaintiff William Moore, who now excepted to that finding.

The VICE-CHANCELLOR [KNIGHT BRUCE]. The case as to the 100*l.* is, I think, beyond the influence of the question, whether there was a *donatio mortis causâ*; for, in my opinion, an effectual trust was declared, *inter vivos*, in favour of the servant maid. The document relating to this sum appears to have been written contemporaneously with the creation of the debt. It is thus: [His Honour read it]. Now, although this was not then signed by Miss Darton, yet it is probable, that, as she so intended the transaction, and as she received the document, she would be deemed to have assented to it, even without signing it. But, in fact, she afterwards signed it. Mr. Moore therefore became a trustee of the amount for Miss Darton during her life, and for Ann Dye after Miss Darton's death. . . .

M'FADDEN v. JENKYNs.

CHANCERY. 1842.

1 Phil. 153.

IN the month of February 1841, Thomas Warry lent the sum of 500*l.* to the Defendant Jenkyns. In the month of December following Thomas Warry died, and the Defendant George Warry having shortly afterwards, as his personal representative, brought an action against Jenkyns to recover the 500*l.*, this bill was filed, alleging that the money was originally intended to be repaid in a short time, but that soon after the loan had been made, Thomas Warry sent a verbal message to Jenkyns by one Bartholomew, a common friend of theirs, desiring him no longer to consider the money as due to him, Thomas Warry, but to hold it "upon trust for the Plaintiff, to be at her absolute disposal, for her own use and benefit." That

¹ So much of the case as relates to the *donatio mortis causa* is omitted. It appeared that both documents were given by Miss Darton, when on her death-bed, to Ann Dye, to be delivered at her death to William Moore in forgiveness of the debt. The gift was held effective as to the document for 500*l.*

Bartholomew delivered the message, and Jenkyns accepted the trust; and that the transaction was communicated to the Plaintiff both by Thomas Warry and by Jenkyns, and that Jenkyns, afterwards, during the lifetime of Warry, and with his knowledge, paid to the Plaintiff the sum of 10*l.* in part execution of the trust; and that Thomas Warry had never afterwards demanded payment of the money or any part of it.

The bill prayed, that it might be declared that, under those circumstances, Jenkyns became and was a trustee of the 500*l.* for the Plaintiff, and that he might be decreed to pay the 490*l.* residue thereof, to the Plaintiff, and that the Defendant George Warry might be restrained from further proceeding in his action against Jenkyns.

The case made by the bill was verified by the affidavits of the Plaintiff, Bartholomew, and Jenkyns, and upon those affidavits Vice-Chancellor Wigram granted an injunction to restrain the prosecution of the action until the hearing of the cause, the Plaintiff submitting to pay the 500*l.* into Court.

The Defendant George Warry now moved, by way of appeal, before the Lord Chancellor, that the Vice-Chancellor's order might be discharged.

THE LORD CHANCELLOR [LYNDHURST]. This was an appeal from a judgment of Vice-Chancellor Wigram,¹ upon a motion for an injunction to stay proceedings at law. The facts stated in support of the motion were shortly these. The testator Thomas Warry had lent a sum of 500*l.* to the Defendant Jenkyns, to be returned within a short period. Some time afterwards Warry sent a verbal direction to Jenkyns to hold the 500*l.* in trust for Mrs. M'Fadden. This he assented to, and, upon her application, paid her a small sum, 10*l.*, in respect of this trust. The main question was, whether, assuming the facts to be as stated, this transaction was binding upon the estate of Thomas Warry. The executor had brought an action to recover the 500*l.* so lent to Jenkyns. It is obvious that the rights of the parties could not, with reference to this claim, be finally settled in a court of law; and, if the trust were completed and binding, an injunction ought to be granted.

Some points were disposed of by the Vice-Chancellor in this case, which are indeed free from doubt, and appear not to have been contested in this Court, viz. that a declaration by parol is sufficient to create a trust of personal property; and that if the

¹ Reported 1 Hare 458.

testator Thomas Warry had, in his lifetime, declared himself a trustee of the debt for the Plaintiff, that, in equity, would perfect the gift to the Plaintiff, as against Thomas Warry and his estate. The distinctions upon this subject are undoubtedly refined, but it does not appear to me that there is any substantial difference between such a case and the present. The testator, in directing Jenkyns to hold the money in trust for the Plaintiff, which was assented to and acted upon by Jenkyns, impressed, I think, a trust upon the money which was complete and irrevocable. It was equivalent to a declaration by the testator that the debt was a trust for the Plaintiff.

The transaction bears no resemblance to an undertaking or agreement to assign. It was in terms a trust, and the aid of the Court was not necessary to complete it. Such being the strong inclination of my opinion, and corresponding, as it appears to do, with that of the learned Judge in the Court below, and with the decision of the Master of the Rolls in the case to which he refers,¹ I cannot do otherwise upon this motion, and in this stage of the cause, than refuse the application.

I must not, however, be understood as pronouncing any conclusive opinion upon the facts of the case. The witness Bartholomew, a professional gentleman, I believe, swears distinctly and in positive terms as to the direction given by the testator; but there are some improbabilities in the case, and it is difficult to say, as the Vice-Chancellor justly observes, what may be the result at the hearing of the cause. As the appeal appears to have been encouraged, if not suggested by the Vice-Chancellor, the motion must be refused without costs.²

CLITHEROE *v.* SIMPSON.

HIGH COURT OF JUSTICE, IRELAND, COMMON PLEAS
DIVISION. 1879.

4 L. R. Ir. 59.

DEMURRER to statement of claim. The statement of claim alleged, that "1st. John Simpson, the father of the defendant, and of Alice Jane Clitheroe, the late wife of the plaintiff, by

¹ *Wheatley v. Purr*, 1 Keen 551. In this case a woman made a deposit in a bank in her name as trustee for others. It was held that *she* was trustee of a valid trust.

² In the following cases the court was of the opinion that a direction given

deed, dated the 27th of May, 1874, and made between the said John Simpson and the defendant, in consideration, amongst other things, of the defendant thereby undertaking and agreeing to pay the said Alice Jane Clitheroe £100 six months after the date of the said deed, with interest thereon at the end of said period, assigned to the defendant, his executors, &c., premises at Kilmainham, in the city of Dublin, for the residue of a term of fifty years, mentioned in a certain lease dated the 9th of January, 1863, from the Governors and Guardians of Steevens' Hospital to the said John Simpson, subject to the covenants and conditions therein contained, and also premises in Kilmainham, of which the said John Simpson was tenant from year to year. 2nd. The said Alice Jane Clitheroe afterwards died on the 25th June, 1876, and the plaintiff, on the 2nd day of April, 1878, obtained forth of the Probate and Matrimonial Division of the High Court of Justice in Ireland letters of administration of the effects of the said Alice Jane Clitheroe as of a person having died intestate. 3rd. The said sum of £100 by the said deed of the 27th May, 1874, agreed to be paid by the said defendant to the said Alice Jane Clitheroe as aforesaid was not, nor was any part thereof, paid to the said Alice Jane Clitheroe, or the plaintiff, and the same, with £21 for interest, making together £121," is now due and owing. The plaintiff claimed payment of the said sum. Demurrer by the defendant, on the grounds that it did not appear that either Alice Jane Clitheroe or the plaintiff was a party to the deed sued on, or capable of suing thereon; that no contract was alleged between the defendant, and either Alice Jane Clitheroe or the plaintiff; and that the said Alice Jane Clitheroe was a stranger to the consideration in the deed.

MORRIS, C.J.. We have no doubt that the demurrer to the statement of claim must be allowed. The statement of claim does not purport to be founded upon any equitable rights or liabilities between the parties. It is founded on contract upon the deed. But the deed is not one between the defendant and

by a creditor to his debtor to pay a third person, when assented to by the debtor, made the debtor a trustee for the third person: *Paterson v. Murphy*, 11 Hare 88; *Parker v. Stones*, 38 L. J. Ch. 46; *Eaton v. Cook*, 25 N. J. Eq. 55. But see *Morgan v. Larivière*, L. R. 7 H. L. 423.

In *Rycroft v. Christy*, 3 Beav. 238; *Meert v. Moessard*, 1 Moo. & P. 8; and *Lambe v. Orton*, 1 Dr. & Sm. 125, a *cestui que trust* directed his trustee to pay the trust fund to a third person, and the trustee assented. It was held that a valid trust for the third person was created.

the plaintiff, or Alice Clitheroe. It is a deed between John Simpson and the defendant. It has been contended that there may be circumstances which would make the defendant a trustee for Alice Clitheroe: if so, they should have been stated. I do not suggest that there are circumstances. But that is not the case that is made. The case that the defendant meets by his demurrer is simply an action of contract on a deed to which he is a stranger, and grounded on the deed. The demurrer must be allowed.

LAWSON and HARRISON, JJ., concurred.¹

STEELE *v.* CLARK.

SUPREME COURT, ILLINOIS. 1875.

77 Ill. 471.

Mr. JUSTICE BREESE delivered the opinion of the Court.

This proceeding was commenced before the county court of Clinton county, and taken by appeal to the circuit court, wherein a judgment was rendered for the plaintiffs for four hundred and forty-four dollars, and costs, from which judgment this appeal is prosecuted by the defendants. It is a case in which the administrator of one Thomas Moore, deceased, presented a claim for allowance against the estate of John Brewster, deceased, for one thousand dollars. The county court allowed the claim to the extent of seven hundred and seventy-seven dollars, and, on appeal to the circuit court, the same was reduced to the above sum of four hundred and forty-four dollars.

A brief statement of the facts will show that this judgment ought not to stand.

It appears that Thomas Moore, the father of Thomas Moore in behalf of whose estate this claim is prosecuted, died in 1852

¹ If A conveys property to B in consideration of B's promise to pay or support A or C, B does not hold the property in trust, but at most only a personal obligation is created. *M'Coubay v. Thomson*, 1 R. 2 C. L. 226 (personal obligation held invalid because consideration did not move from promisee); *Maxwell v. Wood*, 133 Iowa 721 (transferee of property not bound); *Fellows v. Fellows*, 69 N. H. 339 (held revocable); *Faust v. Faust*, 144 N. C. 383. But see *Ahrens v. Jones*, 169 N. Y. 555. See 12 Harv. L. Rev. 564.

If A conveys property to B, who agrees to pay C out of the property or its proceeds, a trust arises. *Kelly v. Larkin*, [1910] 2 I. R. 550.

or 1853, leaving an estate in land, which descended to his son, Robert Moore, this Thomas Moore, and a granddaughter, Mary Stephens; that, in 1850, Thomas Moore, the younger, then about twenty years of age, left this State for California, and has not been heard from since 1866. In 1853, proceedings were instituted for a partition of the estate of Thomas Moore, senior, and one Alfred Tucker was appointed a commissioner to make partition and pay over the proceeds to these several heirs, each share amounting to four hundred and forty-four dollars, which the commissioner received in money, and paid to John Brewster, deceased, the guardian of Mary Stephens, her share, to Robert Moore his share, and, without any authority whatever, as appears, paid to Robert his brother Thomas' share. In 1859 or 1860, Robert Moore, being in debt to his brother Thomas in this sum of four hundred and forty-four dollars, and also to other parties, agreed to sell his farm to Brewster, to pay his debts, and among them this debt to his brother Thomas. For what price the farm was sold, does not appear. Brewster's administrator proved one payment of more than two hundred dollars to one Fouke, a creditor of Robert, and offered to show for what the farm was sold by Robert Moore to him. This evidence the court refused to admit. The defense was, the Statute of Frauds and Perjuries and the Statute of Limitations.

To sustain the recovery, it is urged by appellee that this was a trust fund, and the recovery not barred by the Statute of Limitations. It is claimed and argued by appellee that Brewster, in his lifetime, had become security for the payment of the money received by Robert Moore, belonging to his brother Thomas, which fact, they insist, gives it the character of trust money, and not barred by the Statute of Limitations. A careful examination of the record betrays the existence of no such fact. Neither Dougherty, Dill, the Clarks, nor Mrs. Pratt, called for appellee, state anything of the kind. The simple fact is, that Brewster, on the purchase of Robert Moore's farm, undertook to pay this debt Robert then owed his brother Thomas. As Dougherty states it, Brewster told his brother he had bought Robert Moore's farm, and had become paymaster to Thomas for Robert Moore. This was in 1860. At this time, the relation of these parties was that of debtor and creditor.

It has been settled, by repeated decisions of this court, that, in case of simple contracts, the person for whose benefit a promise is made may maintain an action in his own name upon

it, although the consideration does not move from him. *Eddy v. Roberts*, 17 Ill. 505; *Brown v. Strait*, 19 ib. 89; *Bristow et al. v. Lane et al.*, 21 ib. 194, where the English and American authorities are considered.

In 1860, when this promise was made by Brewster to Robert Moore, admitting it was made, Thomas Moore had a clear right of action against Brewster to recover the amount, had he chosen to accept Brewster as his creditor [debtor?], and, if dead, his administrator had a right of action for five years thereafter. These proceedings were instituted more than thirteen years thereafter, and some years after the death of Brewster.

Under this state of fact, we are at a loss to perceive why the claim was not barred by the Statute of Limitations. We fail to see in the transaction any indication of a trust, to any greater extent than any ordinary assumpsit by one person, for a valuable consideration, to pay a debt he owes, to a third party, instead of paying to the party with whom he contracted.

A court of equity has jurisdiction in all cases of strict trust, but where a mere confidence is reposed, or a credit given, it will not exercise such jurisdiction. As this court said, in *Doyle et al. v. Murphy et al.*, 22 Ill. 502, the various affairs of life, in almost every act between individuals in trade and commerce, involve the reposing of confidence or trust in each other, and yet it has never been supposed that because such confidence or trust in the integrity of another has been extended and abused, therefore a court of equity would, in all such cases, assume jurisdiction.

It is true, as there said, when property is conveyed or given by one person to another, to hold for the use of a third person, such a trust would thereby be created as would give equity jurisdiction to compel the application to the purposes of the trust. But such is not this case. Here was the sale of a farm by the owner, to pay his debts, among which was this debt due his brother Thomas, and which Brewster assumed to pay. It is an ordinary case of debtor and creditor, and the Statute of Limitations was a bar to a recovery.

This money, when in the hands of Tucker, the commissioner, was a trust fund, from which he had no right, of his own mere motion, to part, and place in the hands of Robert Moore, who is not shown to have had any authority to receive it. There can be no doubt the estate of Thomas Moore has a right of action against Tucker, to recover this money, with interest.

There are some objections made on excluding the testimony of Steele, one of the administrators of Brewster, called by the defense. We see no grounds for excluding his testimony, he being called to state what he knew of the case before he became administrator, and afterwards. At first blush he seems to have been competent, not being within any of the exceptions of section 2, chapter 51, R. S. 1874, title, "Evidence and Depositions."

It was also error to exclude the testimony of French, as offered by appellant, and also that of Parks, as to the price to be paid for the farm, and how it was paid.

For the errors above discussed, the judgment is reversed and the cause remanded.

*Judgment reversed.*¹

¹ The distinction between a trust and a purely personal obligation in the nature of a debt is illustrated by certain cases of assignment of partnership assets to a partner. If the assignment is upon trust to pay the firm creditors out of the assets, they will be preferred to the separate creditors of the assignee partner. *Payne v. Hornby*, 25 Beav. 280; *Topliff v. Vail*, 1 Har. Ch. (Mich.) 340; *Renfrow v. Pearce*, 68 Ill. 125; *Parker v. Merritt*, 105 Ill. 293; *Robinson v. Roos*, 138 Ill. 550; *Talbot v. Pierce*, 14 B. Mon. 195; *Harmon v. Clark*, 13 Gray 114; *Wildes v. Chapman* 4 Edw. Ch. 669; *Deveau v. Fowler*, 2 Paige 400 (see *Robb v. Stevens*, 1 Clarke Ch. 191); *High v. Lack*, Phill. Eq. (N. C.) 175; *Buck Co. v. Johnson*, 7 Lea 282; *Rogers v. Nichols*, 20 Tex. 719; *Shackelford v. Shackelford*, 32 Grat. 481; [*Thayer v. Humphrey*, 91 Wis. 276.]

If, on the other hand, the assignment to the partner is absolute, the assignors being content to take the assignee's personal agreement to pay the firm liabilities, and if the assignment is not fraudulent, the firm creditors will have no greater rights against the firm assets so transferred than against any other assets of the assignee partner. And if that partner becomes insolvent, the firm creditors will either get nothing until the separate creditors are paid in full (*Ex parte Freeman*, Buck 471; *Ex parte Appleby*, 2 Dea. 482; *Thomas v. Shillibeer*, 1 M. & W. 124; *Re Isaacs*, 3 Sawy. 35; *Locke v. Hall*, 9 Me. 133; *Robb v. Mudge*, 14 Gray 534; *Wild v. Dean*, 3 All. 579; *Scull v. Alter*, 16 N. J. 147); or, in jurisdictions where a stranger to the promise may sue the promisor, they may share ratably with the separate creditors. *Re Downing*, 3 N. B. R. 748; *Re Long*, 9 N. B. R. 227; *Re Rice*, 9 N. B. R. 373; *Re Collier*, 12 N. B. R. 266; *Re Lloyd*, 22 Fed. Rep. 88; *Hoyt v. Murphy*, 18 Ala. 316; *Devol v. McIntosh*, 23 Ind. 529; *Dunlap v. McNeil*, 35 Ind. 316; *Goudy v. Werbe*, 117 Ind. 154 (*semble*). — AMES.

If B is indebted to A, and B conveys property to C, who agrees to pay B's debt to A out of that property, a trust is created, and C's promise is not required by the Statute of Frauds to be in writing as a "special promise to answer for the debt, default or miscarriage of another." *Dock v. Boyd & Co.*, 93 Pa. 92. See Ames, Cas. Suretyship, 42n.

TOMLINSON *v.* GILL.

CHANCERY. 1756.

Amb. 330.

THE defendant Gill promised, that if the widow of the intestate John Gill would permit him to be joined with her in the letters of administration of his assets, he would make good any deficiency of assets to discharge the intestate's debts.

Bill by creditors of the intestate against Gill, for a satisfaction of their debts, and performance of the promise. It was insisted on the part of the defendant, to be within the statute of frauds and perjuries; and that the promise not being in writing, was void by that statute.¹

LORD HARDWICKE, Chancellor. . . . The plaintiff is proper for relief here for two reasons. 1st, He could not maintain an action at law, for the promise was made to the widow; but he is proper here, for the promise was for the benefit of the creditors, and the widow is a trustee for them. 2dly, The bill is brought for an account, and that draws to it relief, like the common case of a bill to be paid a debt out of assets. It was at first doubted whether the Court should go further than to take the account; but it was afterwards settled, that the Court ought not to make two suits out of one, but give complete satisfaction on such a bill, by decreeing the debt to be paid.²

¹ A part of the opinion is omitted in which it was held that the promise was not within the Statute of Frauds. See Ames, *Cas Suretyship*, 31.

² In the following cases it was held that the obligee was trustee of the obligation for the intended beneficiary: *Vandenberg v. Palmer*, 4 K. & J. 204; *Lamb v. Vice*, 6 M. & W. 467; *Robertson v. Wait*, 8 Ex. 299; *Lloyd's v. Harper*, 16 Ch. D. 290; *Re Flavell*, 25 Ch. D. 89; *Gandy v. Gandy*, 30 Ch. D. 57; *Leopold Walford Ltd. v. Les Affreteurs etc. Société*, [1918] 2 K. B. 498; *Horseshoe Pier etc. Co. v. Sibley*, 157 Cal. 442. See also the numerous cases where, as in *Wheatley v. Purr*, 1 Keen 551, and in *Matter of Totten*, 179 N. Y. 112, *post* Chap. III., sec. IV., one makes a deposit in a bank in trust for another. See also *post*, sec. VIII.

In the following cases, on the other hand, it was held that there was merely a contract to pay a third party: *Re Empress Engineering Co.*, 16 Ch. D. 125; *Colyear v. Countess of Mulgrave*, 2 Keen 81; *Re D'Angibau*, 15 Ch. D. 228, 241; *M'Coubrey v. Thomson*, 1 R. 2 C. L. 226.

See Wald's *Pollock on Contracts*, Williston's ed., 237-255.

In *Leopold Walford Ltd. v. Les Affreteurs etc. Société*, [1918] 2 K. B. 498, Pickford, L. J., said (p. 501): "If A. agrees with B. that he will pay a certain sum of money to B. for the benefit of C., B., as trustee for C., can sue A."

In re CAPLEN'S ESTATE.

BULBECK v. SILVESTER.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1876.

45 L. J. Ch. 280.

THE testatrix, Ann Caplen, in June, 1865, lent the sum of 300*l.* to her niece's husband, Morris Stening, on the security of his promissory note for 300*l.* and interest, payable on demand. She received the interest during the rest of her life, and made no demand for payment of the note. Ann Caplen died on the 30th of May, 1875, and after her death the note was found uncanceled among her papers by her executors, George Silvester and John Walls, who demanded payment. It was then alleged, on the part of Gainor Bulbeck, Ann Caplen's sister, that about September, 1872, Ann Caplen told Morris Stening she wanted him to hold the 300*l.* for the benefit of Gainor Bulbeck and her daughters, Mrs. Stening, Mrs. Edwards, and Mrs. Harvey; and directed him after her own death to pay the interest to Gainor Bulbeck during her life, and to divide the principal sum among her said daughters after her decease.

The case was verified by the affidavit of Morris Stening, and Gainor Bulbeck and her daughters deposed that Ann Caplen had in similar terms communicated to them her intention with regard to the 300*l.*

The question whether this direction created a trust of the 300*l.* was, by arrangement, raised on a summons in a suit for the administration of Ann Caplen's estate, which summons was now adjourned into court.

Mr. Colt, for Gainor Bulbeck. A parol declaration is enough to create a trust of personal property. The direction to hold the 300*l.* for Mrs. Bulbeck and her children was equivalent to a

In *Re Empress Engineering Co.*, 16 Ch. D. 125, Jessel, M. R., said (pp. 127, 129): "A. being liable to B., C. agrees with A. to pay B. That does not make B. a *cestui que trust*. . . . I am far from saying that there may not be agreements which may make C. a *cestui que trust*. . . . It is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person. . . . A married woman may nominate somebody to contract on her behalf, but then the person makes the contract really as trustee for somebody else, and it is because he contracts in that character that the *cestui que trust* can take the benefit of the contract."

declaration by the testatrix that the debt was to be held on trust for them. *M'Fadden v. Jenkyns*, 1 Ph. 153.

[THE MASTER OF THE ROLLS. The difficulty you have to contend with is, that the note was payable on demand. As payment was not demanded, there was no debt.]

The direction was equivalent to a demand. Instead of saying, "Pay me," the testatrix said, "Pay my sister and her daughters after my death"; and the debtor assented. Even admitting that, strictly speaking, you cannot create a trust unless you confer a legal title on the trustee (*Richards v. Delbridge*, L. R. 18 Eq. 11) here a legal title was, in fact, conferred. The obligation on a promissory note payable on demand may be discharged by parol. *Foster v. Dawber*, 6 Ex. 839. What took place was equivalent to a release of the debt, in consideration of the debtor agreeing to apply the money as directed. The testatrix did not intend to release the debtor, except upon terms of payment to these persons. The money was at home in the debtor's hands, and there was no need or indeed power to give him a right to sue. The testatrix, therefore, did all in her power, save the formality of giving up the security, to create a trust, and I submit that a trust was well created.

Mr. B. B. Swan, for the executors, was not called on.

THE MASTER OF THE ROLLS [SIR GEORGE JESSEL]. The evidence does not satisfy me that Mrs. Caplen intended to create an irrevocable trust. Whether she did or not, it is clear that at law she remained owner of the note, and did not therefore create a complete trust. The question that I have to decide is, whether the direction to Mr. Stening was enough to make him a trustee. Mr. Colt argued that it was, for he said the direction impressed a trust on the money, and a declaration of trust by the legal owner was not wanted. I think, however, that a mere agreement on the part of the debtor to apply the money according to the direction of the creditor will not do. There is no magic in words, and, as I explained in *Richards v. Delbridge*, a man may make himself a trustee without declaring that he is a trustee in so many words; but he must do something or other that is equivalent to declaring that he is a trustee. In *M'Fadden v. Jenkyns*, Lord Cottenham [*Lyndhurst?*] certainly said: "The testator, in directing Jenkyns to hold the money in trust for the plaintiff, which was assented to and acted upon by Jenkyns, impressed, I think, a trust upon the money which was complete and irrevocable." But I do not think that applicable to the

present case, where there is nothing to shew that the owner of the note intended to part with her legal title to the money.

I think, therefore, that the executors are entitled to require payment of the note.¹

SPICKERNELL v. HOTHAM.

CHANCERY. 1854.

Kay 669, 673.

THOMAS PRICE, Harry Stephen Thompson, James Croft, and Stephen Croft, as trustees, claimed to be specialty creditors of the testator [George V. Drury] in the cause, under and by virtue of an indenture, dated the 26th of September, 1828, and made between the testator of the first part, the Rev. Thomas Hatton Croft of the second part, Eliza Thompson, spinster, of the third part, and the said trustees of the fourth part, whereby, after reciting that a marriage was intended between the said Thomas Hatton Croft and Eliza Thompson; and that the said testator, being desirous of making some provision, after the decease of the survivor of himself and Charlotte his wife, for the said Eliza Thompson and the issue of the said marriage, had agreed to transfer 962*l.* New 4*l.* per cent. Annuities belonging to him unto the said trustees, upon the trusts and for the purposes thereafter expressed or referred to, the said testator, for himself, his heirs, executors, administrators, and assigns, covenanted with the said trustees, that he the said testator, his executors or administrators, would, immediately after the solemnisation of the said intended marriage, transfer into their names in the books of the Governor and Company of the Bank of England the said 962*l.* New 4*l.* per cent. Bank Annuities, and it was thereby declared, that the said trustees should permit the said testator to receive the dividends of the said 962*l.* New 4*l.* per cent. Annuities for his own use during his life, and after his decease should permit the said Charlotte Drury his wife to receive the said dividends during her life, and after the decease of the survivor of them should

¹ [Morrell v. Wooten, 16 Beav. 197;] Evans's Estate, 6 Pa. Co. 437, *accord*. See also Kelly v. Roberts, 40 N. Y. 432; Fairchild v. Feltman, 32 Hun 398. Gaskell v. Gaskell, 2 Y. & J. 502, and Chandler v. Chandler, 62 Ga. 612, are hardly to be supported, as the facts seem to show a complete novation. The former case is criticised adversely in Vandenberg v. Palmer, 4 K. & J. 204, 214-215. — AMES.

hold the said 962*l.* New 4*l.* per cent. Annuities, and the dividends thereof, upon the trusts therein declared for the benefit of the said Eliza Thompson and the issue of the said then intended marriage.

The marriage between the said Thomas Hatton Croft and Eliza Thompson was duly solemnised, but the said testator did not during his lifetime transfer the said 962*l.* New 4*l.* per cent. Annuities to the trustees, pursuant to his said covenant.

Mr. *J. H. Palmer* for the trustees. This debt is a specialty debt, and is not barred by the statute, because time did not run against the claim during the lifetime of the testator to whom the interest was payable for life, upon the doctrine laid down in *Burrell v. The Earl of Egremont*, 7 Beav. 205, where it was held, that, if the owner of a charge upon an estate be also tenant for life of the estate, as he is bound to apply the rents in payment of the interest of the charge, he will be assumed to have done so, and thus time will not run against the charge during his life. And it was decided in *Meggison v. Harper*, 2 Cr. & M. 322, that part payment to a *cestui que trust* would prevent the operation of the statute. But further, this is not a mere debt, but a trust; for the testator covenanted to transfer a certain sum of stock then belonging to him; and therefore he was a trustee of this stock until he should transfer it according to his covenant.

VICE-CHANCELLOR SIR W. PAGE WOOD. This is like many other cases which occur upon the Statute of Limitations, a case of considerable hardship; but the legislature having enacted, that the lapse of a certain period shall bar the right to recover a debt, I can see nothing in this case to take it out of the operation of the statute. The debt in question is a legal debt, which accrued in 1828 in respect of a breach of covenant by the omission to transfer a sum of stock into the names of trustees which ought then to have been done.

I think that the principle of *Burrell v. The Earl of Egremont* can have no application to this case. It was there decided, that, when there is a charge on real estate, and it is the duty of the person entitled to the charge to keep down the interest, it is assumed that he, being in possession of the estate, has done his duty, and that the interest has been paid to himself. But here the sum of stock which ought to have been brought into existence as a trust fund never had any such existence, and I cannot assume that a person has been paying himself the interest of a non-existing fund.

The *cestuis que trust* could not get at the fund in any other way than by an action to be brought by the trustees; therefore, it is not in any sense a trust on the part of the testator and the action upon the covenant is now barred by the statute.¹ . . .

GILES v. PERKINS.

KING'S BENCH. 1807.

9 East 12.

DICKENSON & Co. were bankers at Birmingham, with whom the plaintiffs had opened a banking account in 1804, which was continued down to the 18th of November, 1805, when Dickenson & Co. stopped payment and became bankrupts. On the 12th of November, 1805, the plaintiffs paid into the bank three bills to the amount of above 1100*l.*, which were indorsed by them, but were not due till December and January following; and at the time of the bankruptcy there was a considerable balance due to the plaintiffs upon their cash and bills (due) account, independent of the three bills in question. It was stated to be the practice of this and other banking-houses in the country, that when bills which were approved were brought to them by a customer, though the bills were not then due, if they had not a long time to run, they would enter them in a gross sum with cash, or paper which was immediately payable, to the credit of the customer; giving him either cash or liberty to draw upon them to that amount. And the bankers so far considered these running bills (which were always indorsed by the customer) as their own, that they would, as convenience required, pay them away to other customers in the usual course of business, or transmit them to their own correspondents in London: and interest was charged on both sides the account on such paper transactions; and if the interest account turned out to be against the customer, the bankers also charged a certain commission. Differing in this respect from the practice of bankers in London, who, upon the receipt of undue bills from a customer, do not carry the amount directly to his credit, but enter them short, as it is called; that is, note down the receipt of the bills in his account, with the amount, and the times when due, in a previous column of the same page; which sums when received are carried

¹ *Re Plumptre's Marriage Settlement*, [1910] 1 Ch. 609, *accord*.

forward into the usual cash column. In the present case the assignees of the bankrupts, considering that the three bills in question had been entered in the bank books in common with cash, and that by the usual mode of dealing the plaintiffs might have drawn for the amount before the bills were due, refused to deliver them up to the plaintiffs on demand; and as they became due the assignees received the money from the acceptors, to the credit of the bankrupts' estate: for which the plaintiffs brought their action for money had and received. And the question was, whether they were entitled to receive back these bills in specie from the bankrupts at the time of their bankruptcy, the same not being then due, though indorsed by them, and the balance of the cash account being in favor of the plaintiffs; or whether they were only entitled to come in as creditors under the commission for the whole amount of their banking account. LORD ELLENBOROUGH, C. J., was of opinion, at the trial before him at Guildhall, that the plaintiffs were entitled to recover; and they accordingly obtained a verdict for the amount of the bills.

Garrow and *Richardson* now moved for a new trial; relying on the course of dealing of country bankers who always entered approved bills at the usual short dates, as cash, and gave the customers the benefit of drawing upon them for the amount accordingly. And he referred to *Bent v. Puller*, 5 T. R. 594, where there having been a general bill account between two parties, one of whom became bankrupt, it was considered that the solvent party, in whose favour the balance was, could not maintain trover for the bills deposited by him with the other; they having been paid in on a general account, and not specifically appropriated to answer particular drafts which had not been paid by the bankrupt.

LORD ELLENBOROUGH, C. J. Every man who pays bills not then due into the hands of his banker places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill or advance money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance. The only difference between the practice stated of London and country bankers in this respect is, that the former, if overdrawn, has a lien on the bill deposited with him, though not indorsed; whereas the country banker, who always takes the bill indorsed, has not only a lien upon it, if his account be overdrawn, but has

also his legal remedy upon the bill by the indorsement; but neither of them can have any lien on such bills until their account be overdrawn: and here the balance of the cash account at the time of the bankruptcy was in favor of the plaintiffs.

PER CURIAM.

Rule refused.

LIPPITT v. THAMES LOAN & TRUST COMPANY.

SUPREME COURT OF ERRORS, CONNECTICUT. 1914.

88 Conn. 185.

APPLICATION by a receiver of the defendant company for advice in the discharge of his official duties. . . .

WHEELER, J.¹ . . . On April 7th, 1913, the National Reserve Bank of New York sent the Thames Company, "for collection and remittance," items of \$523.29 and \$647.84. The second of these items was collected and credited to the bank on April 15th, 1913, and the first on April 25th, 1913. The Thames Company was restrained by order of court from paying out moneys on April 16th, 1913, and the receiver appointed on June 27th, and qualified on July 1st, 1913. Upon the letter accompanying these items, and beneath the signature, appeared the following: "For collection only. Please do not credit until paid." On April 14th, 1913, the Reserve Bank sent the Thames Company, "for collection and remittance," an item of \$27.15, which was collected and credited the bank on the next day. All three items were collected and credited the bank on collection account, but no moneys were set apart for their payment. The bank at the time of the collections was indebted to the Thames Company in the sum of \$294.30, on general account.

There was an agreement between the bank and the Thames Company that the bank should pay the company a fee for collecting items. The bank was the agent to collect these items for the owners; it has since paid their face value, which amounts have never been repaid it. The bank claims that these items so collected constitute a trust fund for it, and as to them it is a preferred creditor and entitled to immediate payment. An adjudication of these questions is asked, and also as to whether the Thames Company can set off the \$294.30 due it on general account against the sum due the bank, if this be found to be a trust fund.

¹ A part of the case is omitted.

The indorsement of these items "for collection and remittance" was a restrictive indorsement. *Freeman's National Bank v. National Tube Works Co.*, 151 Mass. 413, 418, 24 N. E. 779. It created, between the sending and receiving bank, the relation of principal and agent. So long as the items remained uncollected, the principal could control their disposition. The agent had received the items for a specific purpose, and stood toward its principal as a trustee charged with an active duty toward the purpose of the agency, which was the subject of the trust. *Dale v. Gear*, 38 Conn. 15, 18. After the collections were made, the agent or trustee might have continued the trust relation, or, by its conduct toward the collections, have changed the relation to that of debtor and creditor. For example, the agent would change the relation to that of debtor and creditor were it to mingle the funds collected with its own funds, and credit the collections to the sending bank under its arrangement with it to make remittances at specified times. If, on the other hand, it held the funds collected, intending under its agreement to make immediate remittance, and for a very brief period, for business convenience, keeping the funds set apart or on special deposit for its principal, there would be no change in the relation, the trust would continue, and, on failure of the agent pending transmission of the funds, the principal would be entitled to them. *Commercial Bank v. Armstrong*, 148 U. S. 50, 56, 13 Sup. Ct. Rep. 533.

Some of the courts hold the test is found in the ability to trace the fund; if this can be done the trust continues; if it cannot, the trust ceases, and the principal must share with other creditors of the insolvent. While other courts hold the test to be whether the relation of principal and agent has ceased and that of debtor and creditor begun. We agree with the Supreme Court of the United States (*Commercial Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. Rep. 533) that the latter test furnishes the more satisfactory reason. Whether or not the fund can be traced is, as it seems to us, evidence of the existence or non-existence of this relation.

But whatever the ground of recovery adopted, the claimant to the fund must assume the burden of proving the existence of this trust relation. *Bank Commissioners v. Security Trust Co.*, 70 N. H. 536, 550, 49 Atl. 113. The insolvency of the Thames Company terminated its authority to collect. The receiver of the company could not inventory uncollected items, for they

never became part of the assets of the company. If the company collected in spite of the termination of its agency to collect, it held the proceeds as an agent for the sending bank, and they became impressed with a trust from which they cannot be disassociated. *Freeman's National Bank v. National Tube Works Co.*, 151 Mass. 413, 418, 24 N. E. 779; *Manufacturers' National Bank v. Continental Bank*, 148 Mass. 553, 559, 20 E. 193; 5 Cyc. 512. The order of court of April 16th restrained the Thames Company from paying out any of its funds, or declaring or paying dividends on its deposits or capital stock. The order did not in terms purport to prevent the company from making collections of items in its hands. But when the power of the company to remit the proceeds of its collections was taken from it, its power to fulfil the purposes of the agency committed to it by the Reserve Bank was taken away. The bank would not have authorized the collection had it known that the proceeds could not be remitted to it. It would not have converted a practically cash asset into a general claim against the company. When the company lost its power to carry out the terms of its agency, the agency ceased. The claim collected after the order of court of April 16th is in the same position as the claim collected after an adjudication in insolvency. The proceeds are impressed with a trust; the relation of principal and agent has never been transformed to that of debtor and creditor.

As to the two items collected before the order was passed, the facts stipulated do not indicate that the bank intended that the sums collected on these items should be a trust fund, or be forthwith remitted to it. The letter of April 7th, forwarded with the two largest items, did state that the enclosure was "for collection and remittance." There is nothing in the facts presented, and no legal inference to be drawn from the use of these words, which compel the conclusion that immediate remittance was intended. The letter also said: "Please do not credit until paid." This undoubtedly had reference to the custom between banks holding business relations to credit items unless otherwise directed; and it implied that credit might be made upon collection. We think the custom of the banking business is so universal that we may take judicial notice of it, that items collected for another bank are in fact credited, whether the provision "for collection and remittance" be among the printed directions of the letter of the forwarding bank to its correspondent or not. We must presume that by a well-known

custom among banks, moneys of its correspondents, when collected, are mingled with the funds of the collecting bank. *Freeman's National Bank v. National Tube Works Co.*, 151 Mass. 413, 418, 24 N. E. 779. When this is done, the forwarding bank will get a like sum of money, but not the specific fund collected. If the payment of a fee for the collection indicates, as the Reserve Bank asserts, a custom that immediate remittance of the items collected should be made, we could not so hold without a finding of the custom. Until the case is presented of such custom, it will not be necessary to consider the effect of the violation of its contract by the agent by crediting the collections made.

We should have preferred that the record should show more fully all of the facts surrounding this transaction: the relation and course of business between the Reserve Bank and the Thames Company; their mutual custom in making collections; all of their communications with each other; their intention to impress these items with a trust or otherwise; and the customs of banks in similar transactions. Upon the case as presented by this record, we are of opinion that the Reserve Bank, as to these two items, is a general creditor of the Thames Company, and that the proceeds of these items are not impressed with a trust. Against these items the Reserve Bank is entitled to set off the \$294.30 due from it to the Thames Company.

Against the \$523.29 item, impressed as it is with a trust, the amount due the receiver from the Reserve Bank cannot be set off, since these are neither mutual credits nor mutual debts. The Thames Company held the amount due the Reserve Bank as trustee, while the bank owed the Thames Company in its corporate capacity. *Libby v. Hopkins*, 104 U. S. 303, 309; General Statutes, §649.¹ . . .

¹ [In the following cases, as in the principal case and in *Giles v. Perkins*, it was held that while the bank continued to hold the paper, the depositor retained his beneficial ownership:] *Zinck v. Walker*, 2 W. Bl. 1154; *Ex parte* Madison, 1 Rose 241 (cited); *Parke v. Eliason*, 1 East 544; *Ex parte* Rowton, 17 Ves. 426, 1 Rose 15; *Ex parte* Sollers, 18 Ves. 229, 1 Rose 155; *Ex parte* Sargeant, 1 Rose 153; *Ex parte* Pease, 19 Ves. 25, 1 Rose 232; *Ex parte* Wakefield Bank, 1 Rose 243; *Ex parte* Leeds Bank, 1 Rose 254; *Ex parte* Buchanan, 1 Rose 280; *Ex parte* Burton Bank, 2 Rose 162; *Thompson v. Giles*, 2 B. & C. 422; *Ex parte* Armitstead, 2 Glyn. & J. 371; *Ex parte* Benson, Mont. & Bl. 120; *Jombart v. Woollett*, 2 Myl. & C. 389; *Ex parte* Bond, 1 M. D. & D. 10; *Ex parte* Edwards, 11 L. J. Bank. 36; *Ex parte* Barkworth, 1 DeG. & J. 140; *Re* State Bank, 56 Minn. 119; *South Park etc. Co. v. Chicago etc. Ry. Co.*, 75 Minn. 186; *Scott v. Ocean Bk.*, 23 N. Y. 289; *Second Bank v. Cummings*, 89 Tenn. 609; [*Alleman v. Sayre*, 79 W. Va. 763].

Although, in many of the cases just cited, the plaintiff was allowed to succeed in the common law action of trover, it seems clear that in this class of cases, as in those where a defrauded vendor resorts to the same remedy against the fraudulent vendee, the courts of law have, perhaps unconsciously, admitted trover as a substitute for a bill in equity. In *Ex parte Dumas*, 2 Ves. Sr. 582, 583, Lord Hardwicke, in 1754, said: "It must be a very extensive question, whether the property of these bills in point of law remained in the petitioners, so that they might maintain Trover at law. They were all made payable to Julian or order; and then he doubted no action of Trover could be maintained; for the property of the paper will follow the *chose* in action; but it would be sufficient if they could be made trustees for the petitioners." So to the same effect, *Collins v. Martin*, 1 B. & P. 648, 651, *per Eyre*, C. J. Lord Eldon reluctantly recognized the innovation in *Ex parte Pease*, 19 Ves. 25, 46: "I do not consider whether these bills might be recovered in an action. If the doctrine of those cases is right, in which the court has struggled upon equitable principles to support an action of trover, these bills might be recovered at law; but there is no doubt that they might be recovered by a bill in equity."

That an indorsee for collection is a trustee appears clearly from the following cases deciding that such an indorsee may sue in his own name upon the bill or note: *Balls v. Strutt*, 1 Hare 146; *Law v. Parnell*, 7 C. B. (N. S.) 282; *Bancroft v. Paine*, 15 Ala. 834; *Goodman v. Walker*, 30 Ala. 482; *Berney v. Steiner Bros.*, 108 Ala. 111; *Poorman v. Mills & Co.*, 35 Cal. 118; *Toby v. Oregon Pac. R. R. Co.*, 98 Cal. 490; *First Nat. Bk. v. Hughes* (Cal. 1896), 46 Pac. 272; *Meyer v. Foster*, 147 Cal. 166; *Bassett v. Inman*, 7 Colo. 270; *McCallum v. Driggs*, 35 Fla. 277; *Wilson v. Tolson*, 79 Ga. 137 (indorsement for collection); *Lohman v. Cass Co. Bk.*, 87 Ill. 616; *Illinois Conference v. Plagge*, 177 Ill. 431; *Cottle v. Cole*, 20 Iowa 481; *Abell etc. Co. v. Hurd*, 85 Iowa 559; *Lehman v. Press*, 106 Iowa 389 (indorsement for collection); *Manley v. Park*, 68 Kan. 400; *Graham v. Troth*, 69 Kan. 861; *Linney v. Thompson*, 3 Kan. App. 718 (but see *Bohart v. Buckingham*, 62 Kan. 658; *Armour Bros. Banking Co. v. Riley Co.*, 30 Kan. 163); *Freeman's Nat. Bk. v. Nat. Tube Works Co.*, 151 Mass. 413, 417 (indorsement for collection); *Regina etc. Co. v. Holmes*, 156 Mass. 11 (indorsement for collection); *Haskell v. Avery*, 181 Mass. 106 (indorsement for collection); *Boyd v. Corbitt*, 37 Mich. 52; *Moore v. Hall*, 48 Mich. 143; *Wintermute v. Torrent*, 83 Mich. 555; *Watkins v. Plummer*, 93 Mich. 215; *Elmquist v. Markoe*, 45 Minn. 305 (but see *Rock Co. Nat. Bk. v. Hollister*, 21 Minn. 385 (indorsement for collection)); *Jackson v. Sevaton*, 79 Minn. 275; *Young v. Hudson*, 99 Mo. 102; *Guerney v. Moore*, 131 Mo. 650; *Cummings v. Kohn*, 12 Mo. App. 585; *Bank v. Edwards*, 84 Mo. App. 462; *Howe v. Mittelberg*, 96 Mo. App. 490; *Meadowcraft v. Walsh*, 15 Mont. 544; *Hays v. Hathorn*, 74 N. Y. 486 (*semble*); *Hunter v. Allen*, 106 N. Y. App. Div. 557, 559; *Freeman v. Falconer*, 45 N. Y. Super. Ct. 383; *Snyder v. Gruinger*, 77 N. Y. Supp. 234, (but see *Bell v. Tilden*, 16 Hun (N. Y.) 346; *Iselin v. Rowlands*, 30 Hun (N. Y.) 488; *Gerding v. Welch*, 30 N. Y. App. Div. 623); *Seybold v. Bank*, 5 N. D. 460; *Roberts v. Parrish*, 17 Ore. 583; *Smith v. Bayer*, 46 Ore. 143 (indorsement for collection); *Sterling v. Merietta etc. Co.*, 11 S. & R. (Pa.) 179; *Mumford v. Weaver*, 18 R. I. 801; *King v. Fleece*, 7 Heisk. (Tenn.) 273; *Jennings Banking & T. Co. v. Jefferson*, 30 Tex. Civ. App. 534; *Riddell v. Prichard*, 12 Wash. 601.

See also *Mechem, Agency*, sec. 387: Such an endorsement and delivery for the purpose of collection passes the legal title in trust." But see *contra*, *Thatcher v. Winslow*, 5 Mason (U. S.) 58.

[The Negotiable Instruments Law contains the following provisions: Sec. 36. An indorsement is restrictive, which either (1) prohibits the further negotiation of the instrument; or (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for or to the use of some other person. . . . Sec. 37. A restrictive indorsement confers upon the indorsee the right (1) to receive payment of the instrument; (2) to bring any action thereon that the indorser could bring; (3) to transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so. . . . As to the effect of these provisions, see *Brannan*, N. I. L.]

If matured or demand paper is indorsed to a bank "for collection" or "for deposit," the bank is presumptively not a debtor until the paper is paid, although the depositor is credited at once with the amount of the deposit. *Commercial Nat. Bk. v. Armstrong*, 39 Fed. 684; *Fifth Bk. v. Armstrong*, 40 Fed. 46 (depositor credited "subject to payment"); *First Nat. Bk. v. Armstrong*, 42 Fed. 193 (like preceding case); *Beal v. City of Somerville*, 50 Fed. 647; *Louisiana Ice Co. v. State Nat. Bk.*, 1 McGloin (La.) 181; *Tyson v. Western Nat. Bank*, 77 Md. 412; *Manufacturers' Bk. v. Continental Bk.*, 148 Mass. 553 (depositor credited "subject to payment"); *National Butchers etc. Bk. v. Hubbell*, 117 N. Y. 384. But see *contra*, *First Nat. Bk. v. Armstrong*, 39 Fed. 231.

The presumption is the same if such paper is indorsed "for deposit to the credit of" the depositor. *Freeman v. Exchange Bank*, 87 Ga. 45; *Haskell v. Avery*, 181 Mass. 106; [*Miller v. Norton*, 114 Va. 609]. But see *contra*, *Fourth Nat. Bk. v. Mayer*, 89 Ga. 108 (depositor credited "subject to payment"); *American T. & S. Bk. v. Gueder etc. Co.*, 150 Ill. 336 (*semble*).

If such paper is indorsed "for collection and credit," the presumption should be the same as in the case of paper indorsed "for deposit to the credit of." But in the few cases found on this point the bank is treated as a debtor from the time of deposit. *Ayes v. Farmers etc. Bk.*, 79 Mo. 421; *Bullene v. Coates*, 79 Mo. 426; *Flannery v. Coates*, 80 Mo. 444; *Midland Nat. Bk. v. Roll*, 60 Mo. App. 585; *Dymock v. Midland Nat. Bk.*, 67 Mo. App. 97, 102 (*semble*).

If matured paper or paper payable on demand is indorsed without words indicating the purpose of the deposit, and if the depositor is credited with the amount of the deposit, the transaction, according to the current of the decisions is, without more, a purchaser of the paper, so that the bank becomes at once a debtor. *Ex parte Richdale*, 19 Ch. D. 409; *Bissell & Co. v. Fox Bros.*, 51 L. T. R. 663, 53 L. T. R. 193 (*semble*); *National Bk. v. Silke*, [1891] 1 Q. B. 435; *Royal Bank v. Tottenham*, [1894] 2 Q. B. 715; *Capital & Counties Bk. v. Gordon*, [1903] A. C. 240 (*aff'g Gordon v. London etc. Bk.*, [1902] 1 K. B. 242); *Akrokerri Mines v. Economic Bk.*, [1904] 2 K. B. 465 (*semble*); *Burton v. United States*, 196 U. S. 283; *Fifth Nat. Bk. v. Armstrong*, 40 Fed. 46, 48 (*semble*); [*Re H. & L. Jarmulowsky*, 243 Fed. 632;] *National Com. Bk. v. Miller & Co.*, 77 Ala. 168 (*semble*); [*Gonyer v. Williams*, 168 Cal. 452; *Noble v. Doughten*, 72 Kan. 336; *Manufacturers' Bk. v. Continental Bk.*, 148 Mass. 552, 558 (*semble*); *Taft v. Quinsigamond Nat. Bk.*, 172 Mass.

363; *Security Bk. v. Northwestern Fuel Co.*, 58 Minn. 141 (*semble*); *Brusegaard v. Ueland*, 72 Minn. 283; *Bullen v. Coates*, 79 Mo. 426; *Kavanaugh v. Bank*, 59 Mo. App. 540; *United States Nat. Bk. v. Geer*, 53 Neb. 67 (*semble*); *Titus v. Mechanics' Nat. Bk.*, 35 N. J. L. 588 (*semble*); *Metropolitan Nat. Bk. v. Loyd*, 90 N. Y. 530 (adopted in *Brooks v. Bigelow*, 142 Mass. 6, as controlling evidence of the New York law); *Moore v. Riverside Bk.*, 25 N. Y. Misc. 720; *Walton v. Riverside Bk.*, 29 N. Y. Misc. 304; *Friberg v. Cox*, 97 Tenn. 550; *Williams v. Cox*, 97 Tenn. 555.

But in the following cases such a deposit was thought, and, it is submitted, correctly thought not to be a purchase, so that the bank did not become a debtor, but a trustee. *Gaden v. Newfoundland Sav. Bk.*, [1899] A. C. 281 (*semble*); *St. Louis etc. Ry. Co. v. Johnston*, 133 U. S. 566 (reversing s. c. 27 Fed. 243); *Balbach v. Frelinghuysen*, 15 Fed. 675; *Richardson v. Louisville Banking Co.*, 94 Fed. 442; *Richardson v. Continental Nat. Bk.*, 94 Fed. 450; *City of Philadelphia v. Eckels*, 98 Fed. 485; [*People's Bk. v. Erwin*, 238 Fed. 791;] *Moors v. Goddard*, 147 Mass. 287; *Hoffman v. First Nat. Bk.* 46 N. J. L. 604, 607 (*semble*); *Perth Amboy Gas Light Co. v. Middlesex Co. Bk.*, 60 N. J. Eq. 84 (*semble*); *Fayette Nat. Bk. v. Summers*, 105 Va. 689; [*Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74; *American Sav. Bk. & T. Co. v. Dennis*, 90 Wash. 547. See further 7 L. R. A. (N. S.) 694; 47 L. R. A. (N. S.) 552.]

In *Moors v. Goddard*, 147 Mass. 287, *supra*, it was decided that the bank was not a debtor because the customer was allowed to draw against the deposit only as a matter of courtesy; but it was said that, if the customer were entitled to draw as a matter of right, the transaction would import a discount. It should be observed in regard to *Metropolitan Nat. Bk. v. Loyd*, 90 N. Y. 530, that the controversy arose between the depositor and a creditor of the bank to whom the latter had forwarded the paper on account of its debt; the case may be thought, therefore, to show the disposition of the New York courts to strain the facts in order to avoid the application of their unfortunate doctrine that a creditor taking a bill on account of his claim does not rank as a purchaser for value.

[In general as to the relation between the depositor and the bank before collection, see *Morse, Banks & Banking*, 5 ed., Chaps. 16, 36. Dec. Dig., *Banks & Banking*, 156-159; 7 Corp. Jur. 597, 635.]

Relation after Collection. From the moment of collection, however, whether the paper is indorsed in blank, or "for collection," or "for collection and credit," the bank is presumptively a debtor, being entitled and accustomed to treat the proceeds of the paper as its own. *Re Hallett's Estate*, 13 Ch. D. 696, 723, 724, *per* Thesiger, L. J.; *Crowther v. Elgood*, 34 Ch. D. 691, 694, *per* Cotton, L. J. (but see *Re West of England etc. Bk.*, 11 Ch. D. 772); *Marine Bk. v. Fulton Bk.*, 2 Wall. (U. S.) 252; *Planters' Bk. v. Union Bk.*, 16 Wall. (U. S.) 483, 501; *Phoenix Bk. v. Risley*, 111 U. S. 125; *Balbach v. Frelinghuysen*, 15 Fed. 675, 682, 683 (*semble*); *Anheuser-Busch Brewing Ass'n v. Clayton*, 56 Fed. 759; *National Com. Bk. v. Miller & Co.*, 77 Ala. 163; [*United States Nat. Bk. v. Glanton*, 146 Ga. 786;] *Marine Bk. v. Chandler*, 27 Ill. 525; *Marine Bk. v. Rushmore*, 28 Ill. 463; *Tinkham v. Heyworth*, 31 Ill. 519; *Billingsley v. Pollock*, 69 Miss. 759; *Clark v. Merchants' Bk.*, 2 N. Y. 380; *People v. Merchants' etc. Bk.*, 78 N. Y. 269; *Briggs v. Central etc. Bk.*, 89 N. Y. 182; *People v. City Bk.*, 93 N. Y. 582; *National Butchers etc. Bk.*

v. Hubbell, 117 N. Y. 384; *Gordon v. Rasines*, 5 N. Y. Misc. 192; *Bank v. Davis*, 114 N. C. 343; *Parkersburg Bank's Appeal*, 6 W. N. (Pa.) 394; *Akin v. Jones*, 93 Tenn. 353; *Jockusch v. Towsey*, 51 Tex. 129; *Hallam v. Tillinghast*, 19 Wash. 20.

But see *contra*, *Nurse v. Satterlee*, 81 Iowa 491; *Kansas State Bk. v. Bank*, 62 Kan. 788; *Anheuser-Busch Brewing Ass'n v. Morris*, 36 Neb. 31; *Capital Nat. Bk. v. Coldwater Nat. Bk.*, 49 Neb. 786; *State v. Bank of Commerce*, 61 Neb. 181; *Arnot v. Bingham*, 55 Hun (N. Y.) 553.

It is hardly necessary to state that, in jurisdictions in which the deposit would presumptively create a debt, the presumption may be overthrown by evidence of an agreement or understanding that the banker should hold the proceeds of collection as a trust fund. *Re Brown*, 6 Morrell 81 (evidence very slender); *Sherwood v. Savings Bk.*, 103 Mich. 109; or by evidence that in fact the bank treated the proceeds of the collection as a trust fund. *First Nat. Bk. v. Armstrong*, 36 Fed. 59.

Where paper is sent to a distant bank for collection and remittance, the bank, according to the following cases, does not become a debtor upon collection, but is to be treated as a trustee until remittance is actually made either in specie or by an approved draft. *Boone Co. Nat. Bk. v. Latimer*, 67 Fed. 27; *Holder v. Western German Bk.*, 132 Fed. 187, 136 Fed. 90; [*American Can Co. v. Williams*, 178 Fed. 420, aff'd 176 Fed. 816; *Darragh Co. v. Goodman*, 124 Ark. 532 ("collect and remit in Little Rock Exchange");] *First Nat. Bk. v. Hummel*, 14 Colo. 259; *Ober & Sons Co. v. Cochran*, 118 Ga. 396 (*semble*); *Wallace v. Stone*, 107 Mich. 190; *Griffin v. Chase*, 36 Neb. 328; [*First Nat. Bk. v. Dennis*, 20 N. M. 96;] *People v. Bank of Dansville*, 39 Hun (N. Y.) 187; *Plano Mfg. Co. v. Auld*, 14 S. D. 512.

But, it is submitted, the bank should not be required to keep the proceeds of collection apart from its other money, and must be therefore a debtor from the moment of collection. This view is supported by the following cases: *Philadelphia Nat. Bk. v. Dows*, 38 Fed. 172, 183 (*semble*); *Merchants' etc. Bk. v. Austin*, 48 Fed. 25, 32 (*semble*); *First Nat. Bk. v. Wilmington etc. Co.*, 77 Fed. 401; *Union Nat. Bk. v. Citizens Bk.*, 153 Ind. 44; [*Young v. Teutonia Bk.*, 134 La. 879, 135 La. 66;] *Akin v. Jones*, 93 Tenn. 353; *Sayles v. Cox*, 95 Tenn. 579.

Effect of Insolvency. A bank receiving a cash deposit or collecting paper when it knows that it is insolvent, has no right to use the money as its own. It is to be treated therefore not as a debtor but as a constructive trustee of the amount received under such circumstances. *Sadler v. Belcher*, 2 Moo. & R. 489 (*semble*); *Ex parte Clutton*, Fonbl. 167 (*semble*); *St. Louis etc. Ry. Co. v. Johnston*, 133 U. S. 566; *German-American Bk. v. Third Nat. Bk.*, Fed. Cas. No. 5359; *Furber v. Stephens*, 35 Fed. 17; *Peck v. First Nat. Bk.*, 43 Fed. 357; *Franklin Co. Nat. Bk. v. Beal*, 49 Fed. 606, 607 (*semble*); *City of Somerville v. Beal*, 49 Fed. 790; *Wasson v. Hawkins*, 59 Fed. 233; *Richardson v. Denegre*, 93 Fed. 572 (*semble*); *Quin v. Earle*, 95 Fed. 728; *City of Philadelphia v. Aldrich*, 98 Fed. 487; *City of Philadelphia v. Eckels*, 98 Fed. 485; *Richardson v. New Orleans etc. Co.*, 102 Fed. 780; *Richardson v. New Orleans etc. Co.*, 102 Fed. 785; *Richardson v. Olivier*, 105 Fed. 277; *Western German Bk. v. Norvell*, 134 Fed. 724; [*Butler v. Western German Bk.*, 159 Fed. 116; *Clark etc. Co. v. Americus Nat. Bk.*, 230 Fed. 738; *Hutchinson v. Nat. Bk.*, 145 Ala. 196;] *American T. & S. Bk. v. Gueder etc. Co.*, 150 Ill.

336; Union Nat. Bk. v. Citizens Bk., 153 Ind. 44, 49; Page County v. Rose, 130 Iowa 296; Manufacturers' Nat. Bk. v. Continental Bk., 148 Mass. 553; State v. State Bk., 42 Neb. 896 (but see Wilson v. Coburn, 35 Neb. 530); Perth Amboy Gas Light Co. v. Middlesex Co. Bk., 60 N. J. Eq. 84; Chaffee v. Fort, 2 Lans. (N. Y.) 81; Cragie v. Hadley, 99 N. Y. 131; Grant v. Walsh, 145 N. Y. 502; People v. St. Nicholas Bk., 77 Hun (N. Y.) 159 (*semble*); Blair v. Hill, 50 N. Y. App. Div. 33; New York etc. Co. v. Higgins, 79 Hun (N. Y.) 250; Stapleton v. Odell, 21 N. Y. Misc. 94; Orme v. Baker, 74 Oh. St. 337; Corn. Exch. Nat. Bk. v. Solicitors etc. Co., 188 Pa. 330; Jockusch v. Towsey, 51 Tex. 129; [Pennington v. Bank, 114 Va. 674;] Hyland v. Roe, 111 Wis. 361. [See 32 L. R. A. 715; 38 L. R. A. (n. s.) 146; L. R. A. 1915D 404.] But see *contra*, Illinois T. & S. Bk. v. First Nat. Bk., 15 Fed. 858; Lanterman v. Travous, 174 Ill. 459; Commercial etc. Bk. v. Davis, 115 N. C. 226 (*semble*); Sayles v. Cox, 95 Tenn. 579; Klepper v. Cox, 97 Tenn. 534; Venner v. Cox (Tenn., 1905), 35 S. W. 769.

[If, however, it has no knowledge of its insolvency, the rule is otherwise. Balbach v. Frelinghuysen, 15 Fed. 675; Brennan v. Tillinghast, 201 Fed. 609; Gonyer v. Williams, 168 Cal. 452 (*semble*); Terhune v. Bank, 34 N. J. Eq. 367; Perth Amboy Gas Light Co. v. Middlesex Co. Bk., 60 N. J. Eq. 84; Williams v. Cox, 97 Tenn. 555.]

Similarly if a bank receives a deposit from one who, as the bank knows, is violating his duty to another person, the bank is accountable as a trustee to that other person. San Diego Co. v. California Nat. Bk., 52 Fed. 59; Board of Commissioners v. Strawn, 157 Fed. 49; [City of Centralia v. U. S. Nat. Bk., 221 Fed. 755;] State v. Thum, 6 Ida. 323; Independent District v. King, 80 Iowa 497; Bunton v. King, 80 Iowa 506; Myers v. Board of Education, 51 Kan. 87; Fogg v. Bank, 80 Miss. 750; State v. Midland State Bk., 52 Neb. 1; [City of Lincoln v. Morrison, 64 Neb. 822. Cf. City of Sturgis, 38 S. D. 317, *ante* p. 11, and Bischoff v. Yorkville Bk., 218 N. Y. 106, *post* Chap. VII. On the question how far knowledge of an officer is knowledge of the bank, see Interstate Nat. Bk. v. Yates Center Bk., 245 Fed. 294].

Whether the *cestui que trust* can obtain a preference over the general creditors of the bankrupt bank will depend upon whether the amount of money in the bank continuously from the time of the deposit has equalled or exceeded the amount wrongfully received by the bank. 19 Harv. L. Rev. 520. [See James Roscoe (Bolton) Limited v. Winder, [1915] 1 Ch. 62, *post* Chap. IV, sec. VI.]

General Deposit for a Special Purpose. If money is deposited in a bank, not to be drawn out by checks, but to effect some special purpose, such as the payment of a note, the securing of the obligation of a third person, and the like, and nothing is said about keeping the money so deposited separate from the general moneys of the bank, the natural presumption would be that the bank is entitled to mix the money with its own, becoming bound to carry out the purpose of the depositor. Consequently if the bank should become bankrupt in the meantime the depositor would have no preference over the other creditors of the bank. [Schofield Mfg. Co. v. Cochran, 119 Ga. 901; Mutual etc. Ass'n v. Jacobs, 141 Ill. 261; Kuehne v. Union Trust Co., 133 Mich. 602. [See Noyes v. First Nat. Bk., 180 N. Y. App. Div. 162; and cf. Re BARNED'S Banking Co., 39 L. J. Ch. 635, *post*.] But in the following cases the depositor was preferred, the courts failing to distinguish between

a special deposit, and a general deposit for a special purpose. [Montagu v. Pacific Bk., 81 Fed. 602; Titlow v. Sundquist, 234 Fed. 613;] Anderson v. Pacific Bk., 112 Cal. 598; Woodhouse v. Crandall, 197 Ill. 104; Star Cutter Co. v. Smith, 37 Ill. App. 217; Peak v. Ellicott, 30 Kan. 156; Ellicott v. Barnes, 31 Kan. 170; [Sawyers v. Conner, 114 Miss. 363]; Harrison v. Smith, 83 Mo. 210; Kimmel v. Dickson, 5 S. D. 221. [Cf. Madison T. Co. v. Carnegie T. Co., 215 N. Y. 475.]

[If money is delivered in a wrapper to a bank which agrees to hold and return the identical money, the depositor is not a mere creditor of the bank. Fogg v. Tyler, 109 Me. 109.]

If the bank acts fraudulently in receiving the deposit, if, for example, it receives money for the payment of a note of which it purports to be the holder, when in fact it has transferred the note to another, the depositor is entitled to treat the bank as a trustee. Massey v. Fisher, 62 Fed. 958; People v. City Bk., 96 N. Y. 32.

If the trustee for collection sees fit, without authority, to take anything else than money in payment, and surrenders the paper, the depositor, it has been held, has the right to treat the transaction as a collection and so to charge the bank as a debtor. Franklin Co. Nat. Bk. v. Beal, 49 Fed. 606; Harrington v. Merchants' Nat. Bk., 17 Phil. 38. See *contra*, Russell v. Hankey, 6 T. R. 12 (followed in Ridley v. Blackett, Peake Add. Cas. 62, but questioned in Grant, Banking, 4 ed., 80); Levi v. Nat. Bk., 5 Dill. (U. S.) 104; Steinharte v. Nat. Bk., 94 Cal. 362.

[In general as to the relation between the depositor and the bank after collection, see Morse, Banks and Banking, chaps. 16, 36; Dec. Dig., Banks & Banking, 164-175; 7 Corp. Jur. 616.] — AMES MS.

MACKERSY v. RAMSAYS, BONARS, & CO.

HOUSE OF LORDS. 1843.

9 Cl. & F. 818.

LORD CAMPBELL.¹ I am of opinion that the interlocutor of the Lord Ordinary was right, and that the judgment of the Court of Session which reversed it cannot be supported. It appears that Ramsay & Co., of Edinburgh, in the way of their business as bankers, were employed for reward by a customer, with whom they had a cash account, to obtain payment of a bill of exchange drawn on a person in Calcutta, payable to their order. They did not become the owners of the bill, or discount it, but they were to receive payment of it for Mackersy, having a lien on the bill and its proceeds for any balance due to them from him. The payment was to be made to persons to be employed by them, to whom the bill must be indorsed. Mackersy was not to

¹ The concurring opinion of Lord Cottenham, as well as the statement of facts, is omitted.

interfere with the proceeds of the bill till he was credited, or entitled to be credited, by them for its amount. They employed as their agents Coutts & Co. [of London] who employed Alexander & Co. [of Calcutta] who duly received payment from the acceptor, and, having given Coutts & Co. credit in account, five months afterwards became bankrupt. I conceive that these circumstances amount, in point of law, to a payment to Ramsay & Co., and that they were bound to place the amount to the credit of Mackersy.

The general rule of law, that an agent is liable for a sub-agent employed by him, is not confined to cases where the principal has reason to suppose that the act may be done by the agent himself without employing a sub-agent; and here I conceive that the money is to be considered as received by Coutts & Co., whose correspondents actually received it at Calcutta, and credited them with the amount five months before their failure. Mackersy could not have interfered with the money either in the hands of Alexander & Co. or of Coutts & Co. There was no privity between him and either of those houses; but payment to Alexander & Co. was payment to Coutts & Co., and payment to Coutts & Co. was payment to Ramsay & Co., the respondents. I approve of the expression of the Lord Ordinary, when speaking of the receipt of the money by Coutts's correspondents at Calcutta, that "at that moment the law placed it to the credit of the defender."

The judges of the first division truly say that Ramsay & Co. had not become the owners of the bill. If by *vis major*, or *casus fortuitus*, the bill had been destroyed before it reached Calcutta, or if Clelland, the drawer, had become insolvent before it was paid, the loss would not have been theirs. But they might, nevertheless, be agents to receive payment, and be liable for the amount when payment had been actually received.

We have been much pressed with the case of Campbell v. The Bank of Scotland, 2 Dunl. & Bell 1010, decided by Lord Moncrieff, a judge for whose opinion I should entertain as much deference as for the opinion of any judge in Scotland or England; but the facts of the case are not distinctly stated, so that we do not accurately know on what circumstances that judgment proceeded. If he had decided that in a case like this the bankers were not liable for the money received by their correspondents, I should have been bound to say, with all respect, that he had come to an erroneous conclusion.

I therefore move your Lordships that the interlocutors of the first division of the Court of Session complained of be reversed, and that the interlocutor of the Lord Ordinary assoilzieing the defender with the costs, be affirmed.¹

¹ *Prince v. Oriental Bk.*, 3 App. Cas. 325, 335 (*semble*); *Taber v. Perrot*, 2 Gall. (U. S.) 565; *Kent v. Dawson Bk.*, 13 Blatch. (U. S.) 237; *Nat. Exch. Bk. v. Beal*, 50 Fed. 355 (*semble*); *Guelich v. Nat. State Bk.*, 56 Iowa 434, 437; *First Nat. Bk. v. Craig*, 3 Kan. App. 166; *Simpson v. Waldby*, 63 Mich. 439; *Streissguth v. Nat. German-American Bk.*, 43 Minn. 50; *Power v. First Nat. Bk.*, 6 Mont. 251; *First Nat. Bk. v. First Nat. Bk.*, 55 Neb. 303 (but see *First Bank v. Sprague*, 34 Neb. 318); *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Briggs v. Central Nat. Bk.*, 89 N. Y. 182; *St. Nicholas Bk. v. State Nat. Bk.*, 128 N. Y. 26; *Hutchinson v. Manhattan Co.*, 150 N. Y. 250, 257 (*semble*); *Reeves etc. Co. v. State Bank*, 8 Oh. St. 465; *Herman v. Dayton etc. Bk.*, 10 Oh. St. 446; *Young v. Noble*, 2 Disney (Oh.) 485; *Bradstreet v. Everson*, 72 Pa. 124; *Merchants' Nat. Bk. v. Goodman*, 109 Pa. 422, 17 Phila. 38; *Fifth Nat. Bk. v. Ashworth*, 123 Pa. 212; *Schumacher v. Trent*, 18 Tex. Civ. App. 17; [*First Nat. Bk. v. Quinby* (Tex. Civ. App., 1910), 131 S. W. 429], *accord*.

Irwin v. Reeves Pulley Co., 20 Ind. App. 101; [*Falls City Mills v. Louisville etc. Co.*, 145 Ky. 64;] *Daly v. Butchers' Bank*, 56 Mo. 94; *Planters' etc. Bk. v. First Nat. Bk.*, 75 N. C. 534; [*Fanset v. Garden City St. Bk.*, 24 S. D. 248], *contra*.

The decisions are hopelessly irreconcilable on the point whether a bank employed as an agent for collection is liable to the principal for a loss resulting from the laches of a sub-agent. [See *Morse, Banks and Banking*, 5 ed., chap. 17.] — AMES.

The agent bank may validly stipulate that it shall not be liable for the negligence or insolvency of the sub-agent if selected by it with due care.

If A deposits paper for collection with B, and B sends the paper to C, and C sends it to D, it has been held that C is not liable to A for D's negligence. *McBride v. Illinois Nat. Bk.*, 138 N. Y. App. Div. 339. But the opposite result was reached when it appeared that B had stipulated with A against liability for the negligence of its correspondents. *s. c.*, 163 N. Y. App. Div. 417.

EVANSVILLE BANK *v.* GERMAN-AMERICAN BANK.

SUPREME COURT OF THE UNITED STATES. 1895.

155 U. S. 556.

ON June 14, 1887, the German-American Bank transmitted to the Fidelity Bank of Cincinnati for collection a draft, of which the following is a copy:

"Great Western Distilling Co., Distillers and Refiners of Spirits. \$6926.15.

"Peoria, Ills., June 14th, 1887.

"At sight pay to the order of Western Arnold, cashier, sixty-nine hundred twenty-six 15-100 dollars.

"J. B. Greenhut,

"Sec. and Treas.

"To Terre Haute Distilling Co., Terre Haute, Ind.

"No. 4357."

At the time of its transmission it was endorsed: "Pay Fidelity National Bank of Cincinnati, O., or order, for collection for German-American Nat'l Bank of Peoria, Ills. W. Arnold, Cash."

On June 16 the draft was forwarded by the Fidelity Bank to the Old National Bank of Evansville, Indiana, with this additional endorsement: "Pay Old National Bank, Evansville, Ind., cashier, or order, for collection."

On June 18 the draft was forwarded to the First National Bank of Terre Haute, received by the latter on June 20, and paid to it by the Terre Haute Distilling Company on the afternoon of that day between two and three o'clock. On the same afternoon a letter was written by the First National Bank to the Old National Bank, advising the latter of the payment of the draft, and that its amount had been credited to the account of the latter. The letter having been received before banking hours of the 21st, the amount of the draft was, in accordance with its general practice, entered by the Old National Bank in its account with Fidelity Bank as a credit to the latter as of June 20, 1887. On June 21, 1887, the Old National Bank wrote and mailed to the Fidelity Bank a letter, notifying the latter of the payment of the draft and the entry to its credit.

On June 20, 1887, and for ten days prior thereto, the Fidelity Bank was insolvent, but neither the German-American Bank, the Old National Bank, nor the First National Bank had knowledge of this fact, nor did either of said banks have knowledge of such fact until after the failure of the Fidelity Bank at 8.30 A.M., June 21.

No remittance of money or any tangible representative of money representing this draft was ever made by the First National Bank to the Old National Bank or by the Old National Bank to the Fidelity Bank or by the Fidelity Bank or its receiver to the German-American Bank, and the proceeds of this draft never passed between said banks, if at all, otherwise than by the debit and credit entries above mentioned.

Prior to the institution of this suit the Old National Bank and the First National Bank made a mutual settlement of their collection accounts up to and including the above-mentioned entries representing said draft. The mutual collection accounts between the Old National Bank and the Fidelity Bank have not been settled on account of the insolvency of the Fidelity Bank, but the Old National Bank claims upon such settlement the benefit of the amount of said draft as a debit on its account with the Fidelity Bank.

On the books of the Fidelity Bank, as they stood at the beginning of this suit, the Fidelity Bank owed the German-American National Bank \$17,844.77. On the books of the Fidelity Bank and of the Old National Bank, as they stood at the beginning of this suit, the Fidelity Bank owed the Old National Bank \$14,291.57. The above balances are made by debiting the Old National Bank with the amount of said draft and crediting the German-American Bank with the like amount.

Upon these facts judgment was entered in favor of the plaintiff for the amount of the draft and interest, to reverse which judgment the defendant brought this writ of error.¹

BREWER, J. The Fidelity Bank did not purchase this draft from the plaintiff, and, although it acquired the mere legal title, never became its equitable owner. It received it as an agent, and the endorsement, "for collection, for German-American National Bank of Peoria, Illinois," was notice to it and every subsequent holder that it was forwarded simply for collection. Neither by the express terms of the contract between the plaintiff and the Fidelity Bank, nor by the course of business between them, nor by the custom of bankers, did the receipt of the draft by the Fidelity make it a debtor for the amount thereof, neither would it become such debtor until after collection and possession of the proceeds of the draft, either actually or by settlement of accounts between the parties. *Sweeny v. Easter*, 1 Wall. 166; *White v. National Bank*, 102 U. S. 658; *Commercial Bank v. Armstrong*, 148 U. S. 50.

The draft was collected and the proceeds thereof received by the defendant. While it was at first collected by the First National Bank of Terre Haute, yet it was by that bank credited to the defendant, notice of the credit given, and the amount settled between the two banks in the adjustment of their accounts.

The case, therefore, is presented of a receipt of the proceeds

¹ The statement of facts is abridged.

of the draft by the defendant, a sub-agent or agent of the collector, and the non-receipt of the proceeds by the plaintiff, the owner, and the question is whether the former has discharged itself of liability for the moneys which it has thus received.

The contention of the defendant is that it paid the moneys which it received to the party from which it received the draft, to wit, the Fidelity Bank, which was the agent of the owner. It is not pretended that it ever forwarded to the Fidelity Bank the cash therefor, but the claim is that it credited such amount on the account of the Fidelity Bank, the Fidelity being at the time indebted to it, and that this is equivalent to an actual payment of money. The difficulty with this contention is, that, at the time this credit was entered by the defendant, the Fidelity was not in a condition to receive credit or make any settlement; it was insolvent, and in the custody of the officers of the law. The defendant received no notice of the collection by the Terre Haute bank, made no entry on its books, took no other action looking to a settlement with the Fidelity until the morning of the 21st, and it is found not only that the Fidelity had been insolvent for ten days theretofore, but that on the 20th the bank examiner had taken possession — a possession which he maintained until the appointment of the receiver Armstrong. At the time this examiner took possession the business of the bank stopped, and the authority of the directors and officers ceased. They could not thereafter make any settlement with the defendant to the prejudice of the rights of third parties. If on the morning of the 21st the defendant had brought to the Fidelity Bank in cash the amount which it had collected on this draft and tendered it to the officers of the Fidelity Bank in payment of a balance due to such bank, the latter could not have lawfully received that cash for such purpose, so as to relieve the defendant from its liability to the plaintiff. And, *a fortiori*, if it could not accomplish this by an actual tender of the money, it cannot by a mere entry on its own books. The only way in which the defendant could, after receiving the amount of this check, discharge itself from liability to the plaintiff was by a payment to the Fidelity Bank, its endorser, at a time when the Fidelity Bank was authorized to receive it for the plaintiff, and the authority to so receive it terminated when it stopped business.

There is nothing in the case of the Commerical Bank of Pennsylvania v. Armstrong, 148 U. S. 50, which conflicts with

this. On the contrary, it was said in that opinion, in reference to a transaction similar to the one before us: "The plaintiff, then, as principal, could unquestionably have controlled the paper at any time before its payment, and this control extended to such time as the money was received by its agent, the Fidelity."

Language found later in the opinion, upon which the defendant relies, must be understood in relation to the particular facts of that case. Certain drafts had been received by the Fidelity Bank and forwarded for collection to other banks, and by the latter collected. Of these collections some had been made by banks indebted to the Fidelity, and others by banks to whom the Fidelity was indebted, and the amount of such collections credited on their accounts with the Fidelity. The former were paid by such banks to Armstrong, the receiver of the Fidelity, and after its failure. The suit was one brought by the original owner of these drafts against the receiver, to charge the funds in his hands with a trust in respect to all these collections, and it was adjudged that he was such trustee as to the former, and not as to the latter; the former, because the collection had not been completed by the Fidelity before its failure, and, therefore, the amounts thereof subsequently received by the receiver were received for the benefit of the original holder; whilst, as to the latter, the collection by the Fidelity was complete and the original holder stood simply as a general creditor of the Fidelity for such amounts. There was in respect to these latter collections no question as to the precise time at which the transaction between the Fidelity and the collecting banks was completed, and no suggestion that an entry on the books of the Fidelity, or some other act indicating its assent to the action of the collecting banks in crediting the amount, was necessary to complete the settlement. On the contrary, it was assumed that the settlement between the Fidelity and its agents was complete at the time of the failure.

It is unnecessary, in this case, to consider what would be the rights of the parties if a settlement between the defendant and the Fidelity Bank had been consummated while the latter was actually engaged in business, although in fact insolvent; for, as stated, no action was taken by the defendant until after the Fidelity had stopped business, and was in possession of the officers of the law. The mere fact that news of the condition of the Fidelity had not reached the defendant at the time it

made this entry is immaterial. The condition of insolvency was "disclosed" because it was known to the officers of the law, and action had been taken by them in consequence thereof, and that is all that is necessary. We think the conclusions of the Circuit Court were correct, and its judgment is *Affirmed*.¹

¹ It is well settled, in accordance with the principal case, that the owner of a bill deposits it with an agent, *i.e.* a trustee, for collection, indicating by the words "for collection" or otherwise his interest in the bill, and the agent, in due course, transfers the bill to a sub-agent, *i.e.* a sub-trustee, for collection, and *before* collection the agent becomes bankrupt, the depositor of the bill is entitled to reclaim it, or the amount collected, from the sub-agent without regard to the state of the accounts between the agent and sub-agent. *Sweeny v. Easter*, 1 Wall. (U. S.) 166; *First Nat. Bk. v. Reno Co. Bk.*, 3 Fed. 257; *Bank of Metropolis v. First Nat. Bk.*, 19 Fed. 301; *First Nat. Bk. v. Armstrong*, 39 Fed. 231; *Fifth Nat. Bk. v. Armstrong*, 40 Fed. 46; *First Nat. Bk. v. Armstrong*, 42 Fed. 193; *Peck v. First Nat. Bk.*, 43 Fed. 357; *Richardson v. Louisville Banking Co.*, 94 Fed. 442; *Josiah Morris Co. v. Alabama Carbon Co.*, 139 Ala. 620; [*Walker v. McNeil*, 68 Fla. 181;] *Central R. R. v. First Nat. Bk.*, 73 Ga. 383; *First Nat. Bk. v. First Nat. Bk.*, 76 Ind. 561; *Union Bank v. Johnson*, 9 Gill & J. (Md.) 297; *Cecil Bank v. Farmers Bank*, 22 Md. 148; *Manufacturers' Nat. Bk. v. Continental Nat. Bk.*, 148 Mass. 553; *Freeman's Nat. Bk. v. National etc. Co.*, 151 Mass. 413; *Nash v. Second Nat. Bk.*, 67 N. J. L. 265; *Warner v. Lee*, 6 N. Y. 144; *Naser v. First Nat. Bk.*, 116 N. Y. 492; [*Bank of America v. Waydell*, 187 N. Y. 115; *King v. Bowling Green T. Co.*, 145 N. Y. App. Div. 298, 404;] *Stevenson v. Fidelity Bank*, 113 N. C. 485; *Nat. Bank v. Johnson*, 6 N. D. 180; *Producers' etc. Bk. v. Ricketts*, 1 W. N. (Pa.) 48; *Blaine v. Bourne*, 11 R. I. 119; *Bank of Sherman v. Weiss*, 67 Tex. 331; [*Miller v. Norton*, 114 Va. 609;] *Foster v. Rincher*, 4 Wyo. 484. See also, to the same effect, *Kaltenbach & Co. v. Lewis*, 10 App. Cas. 617 (a sub-factor received proceeds of goods after the bankruptcy of factor and knowledge thereof, and with notice of the principal's claim).

If the agent becomes bankrupt *after* collection by the sub-agent, but before the sub-agent has paid the amount collected to the agent or settled with him for it, the claim against the sub-agent does not form part of the bankrupt agent's assets, but is held by him for the benefit of the depositor. *Commercial Bank v. Armstrong*, 148 U. S. 50, 39 Fed. 684; *Re Armstrong*, 33 Fed. 405; *Nat. Exch. Bank v. Beal*, 50 Fed. 355, *aff'd* 55 Fed. 894 (but see *contra*, *Hyde v. First Nat. Bk.*, 7 Biss. (U. S.) 156); *Henderson v. O'Connor*, 106 Cal. 385; *Freeman v. Exchange Bank*, 87 Ga. 45 (garnishee process against sub-agent as debtor of depositor); *Armstrong v. Nat. Bank*, 90 Ky. 431; *Guignon v. First Nat. Bk.*, 22 Mont. 140; *Naser v. First Nat. Bk.*, 116 N. Y. 492 (garnishee process against sub-agent as debtor of depositor); *Importers etc. Bk. v. Peters*, 123 N. Y. 272; *Bank of Clarke Co. v. Gilman*, 81 Hun (N. Y.) 486, *aff'd* 152 N. Y. 634; *Boykin & Co. v. Bank*, 118 N. C. 566.

In *Commercial Bank v. Armstrong*, 148 U. S. 50, the crediting of the agent bank by the sub-agent bank with the amount collected was decided to be equivalent to a payment or settlement in case the agent bank was indebted to the sub-agent. But the opposite view was taken in *Peoples Bank v. Jeffer-*

son Co. Sav. Bk., 106 Ala. 524; Nat. Citizens' Bk. v. Citizens' Nat. Bk., 119 N. C. 307, and also in the cases cited *infra* in the last four lines of the last paragraph but one of this note. See further Freeman's Nat. Bk. v. Nat. Tube Works Co., 151 Mass. 413, 418-419.

If the agent, as a *del credere* factor, holds the claim against the sub-agent as a trustee for the depositor, the sub-agent is obviously not entitled to make use of any claim against the agent by way of set-off, to the prejudice of the depositor.

If the owner of a bill deposits it with an agent, i.e. a trustee, for collection, but without indicating the trust on the bill, and the agent in the natural course of business transfers the bill to a sub-agent for collection, to be held and credited on the account between the agent and sub-agent, and then the agent becomes bankrupt, being indebted to the sub-agent, the principal cannot reclaim the bill or its proceeds from the sub-agent, in jurisdictions where a transferee on account of an antecedent debt is treated as a purchaser for value without notice. *Johnson v. Robarts*, L. R. 10 Ch. 505; *Bank of Metrop. v. N. E. Bank*, 1 How. (U. S.) 234, 6 How. (U. S.) 212 (but see *Wilson & Co. v. Smith*, 3 How. (U. S.) 763); *Vickrey v. State Sav. Ass'n.*, 21 Fed. 773; *Wyman v. Colo. Nat. Bk.* 5 Col. 30; *Coors v. German Nat. Bk.*, 14 Col. 202; *Doppelt v. Nat. Bank*, 175 Ill. 432; *Am. Exch. Nat. Bk. v. Theummler*, 195 Ill. 90; *Rathbone v. Sanders*, 9 Ind. 217; *Wood v. Boylston Nat. Bk.*, 129 Mass. 358; *Cody v. City Nat. Bk.*, 55 Mich. 379; *Edson v. Angell*, 58 Mich. 336; *Garrison v. Union T. Co.*, 139 Mich. 392; *Continental Nat. Bk. v. First Nat. Bk.*, 84 Miss. 103; *Hoffman v. First Bank*, 45 N. J. L. 604 (but see *Nash v. Nat. Bk.*, 67 N. J. L. 265, *contra*); *Winfield Nat. Bk. v. McWilliams*, 9 Okla. 493; *Carroll v. Bank*, 30 W. Va. 518. (But see, *contra*, *Lawrence v. Stonington Bank*, 6 Conn. 521; *Miller v. Farmers' etc. Bk.*, 30 Md. 392; *First Nat. Bk. v. Strauss*, 66 Miss. 479; *Millikin v. Shapleigh*, 36 Mo. 596; *Bury v. Woods*, 17 Mo. App. 245.) For the same reason, where goods are consigned to a factor for sale, and by the factor, in due course, to a sub-factor, who sells and receives the proceeds before the factor's bankruptcy, and in ignorance of the original consignor's interest in the goods, the sub-factor is entitled to apply the proceeds in satisfaction of any claim he may have against the factor. *New Zealand etc. Co. v. Watson*, 7 Q. B. D. 374.

In jurisdictions where one who takes negotiable paper on account of an antecedent debt is not treated as a purchaser for value, the principal is, of course, entitled to recover the bill, if it is still uncollected and in the hands of the sub-agent. *Van Amee v. Bank of Troy*, 8 Barb. (N. Y.) 312; *Scott v. Ocean Bank*, 23 N. Y. 289; *Hoffman v. Miller*, 9 Bosw. (N. Y.) 334; *Commercial Bank v. Marine Bank*, 3 Keyes (N. Y.) 337; *Dod v. Fourth Nat. Bk.*, 59 Barb. (N. Y.) 265; *Stark v. U. S. Nat. Bk.*, 41 Hun (N. Y.) 506; *First Nat. Bk. v. Gregg*, 79 Pa. 384; *Hackett v. Reynolds & Co.*, 114 Pa. 328. And after collection the principal may enforce the sub-agent's liability as debtor to the agent without any deduction by way of set-off of any debt due from the agent to the sub-agent. *McBride v. Farmers' Bank*, 26 N. Y. 450; *Dickerson v. Wason*, 47 N. Y. 439; *West v. American Exch. Bk.*, 44 Barb. (N. Y.) 175; *Lindauer v. Fourth Nat. Bk.*, 55 Barb. (N. Y.) 75; *Jones v. Milliken*, 41 Pa. 252.

The decisions cited in the preceding paragraph would seem no longer to represent the law of New York and Pennsylvania since both states have adopted the Negotiable Instruments Law by which "An antecedent or pre-

existing debt constitutes value." But in *Bank of America v. Waydell*, 103 N. Y. App. Div. 25, it was decided, in accordance with *Sutherland v. Mead*, 80 N. Y. App. Div. 103, and *Roseman v. Mahony*, 86 N. Y. App. Div. 377, that the previous New York rule as to value had not been changed by the Negotiable Instruments Law. [But the later trend of the decisions in New York is toward holding that one who takes negotiable paper as security for an antecedent debt is a holder for value. *King v. Bowling Green T. Co.*, 145 N. Y. App. Div. 398; *McBee Co. v. Shoemaker*, 174 N. Y. App. Div. 291; Crawford, *Negotiable Instruments Law*, 4 ed., p. 63.] — AMES MS.

In re BARNED'S BANKING COMPANY (LIMITED).
MASSEY'S CASE.

CHANCERY. 1870.

39 L. J. Ch. 635.

A BILL of exchange for 185*l.* drawn by Massey on a Mr. Fox was by the latter accepted, payable at the office of Messrs. Prescott & Co., the correspondents in London of Barned's Banking Company.

In pursuance of an arrangement with Fox, Massey, on the 17th of April, 1865, (being the day before the bill became due), paid into the office of Barned's Banking Company at Liverpool (with which neither Massey nor Fox kept any account) the proper amount to be remitted to Prescott & Co., in order to take up the bill on its becoming due. On the following day the bank stopped payment without having made the remittance to Prescott & Co.; the bill was in consequence dishonored, and was subsequently paid by Massey, who now claimed in the winding up of the bank to recover the whole amount paid to it for remittance to London as aforesaid.

Mr. Roxburgh and *Mr. Badcock*, for Massey, relied on *Farley v. Turner*, 26 L. J. Ch. 710, submitting that their case was stronger than that of the creditor in that case, inasmuch as here neither drawer nor acceptor was a customer of the bank.

Sir R. Baggallay and *Mr. Kekewich*, for the official liquidator of the company, were not called upon.

THE MASTER OF THE ROLLS [ROMILLY]. This is a different case from *Farley v. Turner*. There the country bank, after receipt of the money, and instructions from Goodwin to pay the bill which was about to fall due at the office of their London correspondents, Robarts & Co., remitted bills to Overend &

Gurney for discount, directing the latter to hand the proceeds to Robarts & Co. to provide them with funds to meet the bill. Robarts & Co. accepted the money for the purpose, but afterwards, having heard of the stoppage of the country bank, held their hands, and allowed the bill to be dishonored. The question then arose, for whom they held the money provided to meet the bill, whether for the general creditors of the country bank, or Goodwin, and it was held to be for the latter. There the country bank had applied the money, and the town agent had received it for the specific purpose. Here there was no application of the money, and Mr. Massey has no lien, but merely a right to prove along with the general creditors.¹

¹ *Re Hosie*, 7 N. B. R. 601, *accord*. *Ryan v. Phillips*, 3 Kan. App. 704; *Johnson v. Whitman*, 10 Abb. Pr. N. S. 111; *Bank of Blackwell v. Dean*, 9 Okla. 626, *contra*.

A deposit of money in a bank, which agrees in consideration thereof to meet a liability from the depositor to a third person is often regarded as a trust. But, in the absence of evidence that the money was delivered as a special deposit, the transaction does not create a trust, but only an obligation of the banker to the depositor to pay out of its general assets the claim of the third person. The depositor may sue in special *assumpsit* for the breach of this obligation. *Hill v. Smith*, 12 M. & W. 618. Whether the third person may sue on this promise will depend upon the law, in a given jurisdiction, as to promises to one person of performance to another. In England, therefore, the beneficiary has no right against the banker. *Williams v. Everett*, 14 East 582; *Steward v. Fry*, 7 Taunt. 339; *Yates v. Bell*, 3 B. & Al. 643; *Wedlake v. Hurley*, 1 Cr. & J. 83; *Cobb v. Becke*, 6 Q. B. 930, 933, per Paterson, J.; *Moore v. Bushell*, 27 L. J. Ex. 3; *Henderson v. Rothschild*, 33 Ch. D. 459. See, to the same effect, *Wilson v. Lizardi*, 15 La. 255; *Conery v. Webb*, 12 La. An. 282; *Nicholson v. Crook*, 56 Md. 55; *McDonald v. American Nat. Bk.*, 25 Mont. 456.

In the United States, generally, the opposite rule prevails. But the promisee, if solvent, may defeat the beneficiary's right by a release or modification of the banker's duty at any time before the beneficiary has expressed his assent to the original obligation. *Moore v. Meyer*, 57 Ala. 20, 22 (*semble*); *Mayer v. Chattahoochee Bank*, 51 Ga. 325; *Brockmeyer v. Nat. Bank*, 40 Kan. 376, 744; *Simonton v. First Bank*, 24 Minn. 216; *Butler v. Duprat*, 51 N. Y. Sup'r Ct. 77; *Ætna Nat. Bk. v. Fourth Nat. Bk.*, 46 N. Y. 82; [*Staten Island C. & B. Club v. Farmers' L. & T. Co.*, 41 N. Y. App. Div. 321; *Noyes First Nat. Bk.*, 180 N. Y. App. Div. 162;] *First Nat. Bank v. Higbee*, 109 Pa. 130. But see *contra* [*Dolph v. Cross*, 153 Iowa 289 (beneficiary preferred to garnishing creditor of depositor);] *Re Le Blanc*, 14 Hun 8.

If there is a mere deposit with directions to the banker, but no agreement by him to pay out of his general assets the depositor's liability to a third person, the latter has, obviously, no right against the banker. *Ex parte Heywood*, 2 Rose 355; *Grant v. Austen*, 3 Price 58; *Seaman v. Whitney*, 24 Wend. (N. Y.) 260; *Caisse v. Tharp*, 5 Can. Pr. R. 265. — AMES.

FARLEY v. TURNER.

CHANCERY. 1857.

26 L. J. Ch. 710.

IN December, 1856, Messrs. Farley, Turner, & Jones carried on the business of bankers at Kidderminster, and on the 9th of that month Mr. Goodwin, a customer of the bank, who had then a balance of 942*l.* in the bank, paid in a further sum of 707*l.* At the same time he gave specific directions to the clerk that 500*l.* of this money was lodged for the purpose of paying a bill which would become due at Messrs. Robarts & Co.'s on the 14th of December. He also wrote out the following notice, which he left with the bank clerk:

"Messrs. Farley, Turner, & Jones:

"Advise Messrs. Robarts, Curtis, & Co. to pay, as under my acceptance, dated October the 11th, at two months, due December the 14th, to J. & C. Sturge.

"500*l.*

D. W. GOODWIN."

In pursuance of these instructions, advice was immediately forwarded by the Kidderminster Bank to Messrs. Overend & Gurney to pay 500*l.*, part of the produce of various bills sent to them to discount, to Messrs. Robarts & Co. to meet Mr. Goodwin's acceptance. This was done on the 11th of December, and on the morning of the 12th Messrs. Robarts & Co. received information of the death of Mr. Turner, one of the firm of Farley, Turner & Jones, which took place on the evening of the 11th after the bank was closed; and the firm having ceased to carry on business, the 500*l.* was not applied in payment of the acceptance of Mr. Goodwin, but was subsequently paid over to the representatives of the estate.

It further appeared that the 707*l.* lodged at the Kidderminster Bank by Mr. Goodwin was carried to his general banking account.

A suit was instituted for the administration of the estate of Mr. Turner, and a question was now raised upon an adjourned summons from chambers, whether the 500*l.* so paid to Messrs. Robarts & Co. belonged to Mr. Goodwin or to the general creditors of the bank.

KINDERSLEY, V. C. I think that the claimant is entitled to the 500*l.* specifically. I am fearful lest I should be influenced in my decision by this being a hard case, since hard cases often make bad law, but still I feel a strong conviction that it will be

in accordance with the law to allow the claim. The matter stands in this way. Goodwin having to pay a bill which he had accepted, payable at Robarts & Co., thought fit to pay into the hands of his bankers, Messrs. Farley, Turner, & Jones, a sum of 707*l.* in addition to the balance then standing to his credit. According to the statement in the case, it appears that at the time of paying in the 707*l.* Goodwin told the clerk that 500*l.* of this money was to be applied for the specific purpose of meeting an acceptance, payable at Robarts & Co.'s, to become due on the 14th. Goodwin at the same time signed the notice before stated. Now, what was the effect of this direction to the bankers? Goodwin in effect said, "There is a bill which I want paid at Robarts & Co., therefore send them 500*l.* of this money and advise them to apply it in payment of this bill." The direction is accepted by the bankers, or by their clerk, which amounts to the same thing, and the clerk did what appears to be usual. There was no negligence on his part; at the same time he placed the whole amount of 707*l.* to Mr. Goodwin's general banking account. He might certainly have sent up a check for 500*l.* to Messrs. Robarts & Co., and placed the remaining sum to Mr. Goodwin's account; but he took the ordinary course and sent up the 500*l.*, debiting Mr. Goodwin's banking account with that sum, and they informed Robarts & Co. that such a bill would be presented. Now, it so happened that the Kidderminster Bank had other bills, more or less under similar circumstances, which they wanted paid at Robarts's bank, and they sent up a batch of bills to Messrs. Overend & Gurney for them to discount, and directed them to pay the amount into Robarts & Co.'s bank for the purpose of meeting other bills, as well as that for 500*l.* It appears to me that the course pursued was the same as if, having no occasion to pay more than the 500*l.* bill, they had simply sent up the specific amount with a direction to pay that particular bill. It is true that the money was not ear-marked as if it had been locked up in a box, but it is a portion of the 707*l.* which had been paid in expressly for the purpose of meeting the bill for 500*l.* The facts of this case differ, I think, from the cases cited. I admit that the money is not a particular deposit with the bankers, but it is money placed in their hands to be applied in a particular way. What I now decide will not trench upon the authorities which decide that money paid into a banker's is not a deposit which you may receive back in the identical notes and sovereigns, but that it

is a debt. That is quite a different case. Under the circumstances, I am of opinion that the 500*l.* belongs specifically to Goodwin, and not to the general creditors of Mr. Turner. The costs will come out of the general estate.¹

SECTION V.

A Trust distinguished from a Condition.

ANONYMOUS.

———. 1581.

4 Leon. 2.

A MAN made a feoffment in fee *sub conditione, ea intentione*, that his wife should have the land for her life, the remainder to his younger son in fee; the feoffee died without making such an estate; the heir of the feoffor entered. It was resolved, that it was not a condition, but an estate, which was executed presently according to the intent.²

¹ See *Johnson v. Robarts*, L. R. 10 Ch. 505; *Commercial Nat. Bk. v. Hamilton Nat. Bk.*, 42 Fed. 880; *Montagu v. Pacific Bk.*, 81 Fed. 602; *Drovers' Bk. v. O'Hare*, 119 Ill. 646; *Dumond v. Merchants' Nat. Bk.*, 150 Ill. 515; *Amer. Exch. Bk. v. Mining Co.*, 165 Ill. 103; *Cutler v. Amer. Exch. Nat. Bk.*, 113 N. Y. 593.

² "*Per plures*, if a man make a feoffment in fee *ad intentionem* to perform his will, this is no condition, but a declaration of the purpose and will of the feoffor, and the heir cannot enter for non-performance. 31 H. 8." Bro. Abr. Conditions, pl. 191.

"If, indeed, a feoffment to uses was subject to a condition that the land should revert in the feoffor if the feoffee failed to perform the trust, the feoffor or his heir, upon the breach of this condition subsequent, might enter, or bring an action at common law for the recovery of the land. Only the feoffor or his heir could take advantage of the breach of the condition (Y. B. 10 Hen. IV. f. 3, pl. 3), and the enforcement of the condition was not the enforcement of the use, but of a forfeiture for its non-performance. Moreover, such conditions seem not to have been common in feoffments to uses, the feoffors trusting rather to the fidelity of the feoffees." — Ames, Lect. Leg. Hist., 236.

SMITH v. ALTERLY.

CHANCERY. 1672.

Freem. C. C. 136.

A. DEVISETH his lands to his wife, and after to his eldest son, with condition that if his wife should be with child, 80*l.* should be paid by his eldest son and heir at law to the child after the mother's death; the wife had a child, and [there]after her eldest son conveys away the land to a purchaser. And on proof that the purchaser had notice of the will, a decree was for the daughter for her money devised, and declared it was a trust to go with the lands; and yet this will was void in law, as to the legacy, seeing he who was to have the benefit of the breach of the condition was the heir, who was to pay the legacy.¹

WRIGHT v. WILKIN.

EXCHEQUER CHAMBER. 1862.

31 L. J. Q. B. 196.

THIS was an action of ejectment brought by the heir-at-law of one Mary Mann, to recover certain lands and tenements in the county of Norfolk.

The defendant appeared and defended as landlord for the whole.

At the trial, which took place before Cockburn, C.J., at the Norwich Lent Assizes for 1860, it appeared that the defendant claimed as devisee in fee under the last will and testament of one Mary Mann above mentioned, which bore date the 15th of May 1854. By this will the testatrix made several bequests of goods and chattels and sums of money to different persons, amongst others to the vicar and chapelwardens of Tilney St. Lawrence, in the county of Norfolk, for charitable purposes. The will then proceeded as follows: "And I give, devise and bequeath unto Thomas Martin Wilkin, of" &c., "all my real estates, both freehold and copyhold, in" &c., "and all the residue of my personal estate and effects, to hold to him the said T. M. Wilkin, his heirs, executors, administrators and assigns for ever, upon this express condition, that if my personal estate

¹ Cf. Anon., Freem. C. C. 278.

should be insufficient for the purpose, that he or they do and shall, within twelve months after my decease, pay and discharge all and every the legacies hereinbefore bequeathed, and I feel confident that he will comply with my wish, it being my particular desire that all the above legacies shall be paid. And I do hereby charge and make chargeable all my said real and personal estate with the payment of the aforesaid several legacies and bequests."

It appeared that Mr. Wilkin, the defendant, had not paid any of the legacies within the period of twelve months, and it was contended that the estate left to him was forfeited in consequence of his not having done so. The jury found a verdict for the defendant; and the learned Judge gave leave to the plaintiff to move to enter the verdict for him.

A rule was accordingly obtained, which, after argument, was discharged. 2 B. & S. 232.

WILLIAMS, J.¹ I cannot find sufficient upon the face of this will to shew that the testatrix intended this devise to operate by way of condition. With regard to the passage from Sugden on Powers, 122, which has been here referred to, all that Lord St. Leonards means to say is, I take it, this — That the remedy given by the Court of Chancery to carry out the testator's intention was not in old times regarded by the Courts of common law; and that the Courts of common law held words in a will to constitute a condition on the consideration that if they did not, there would be no remedy at all; that that reason has long ago ceased, and that therefore a different view has been taken and ought to be taken as to whether particular words constitute a condition. Looking at the whole will in this case, it seems to me more convenient to construe this as a trust than as a condition.

The other Judges concurred.

*Judgment affirmed.*²

¹ Concurring opinions of Erle, C. J., and Pollock, C. B., are omitted.

² See *Merchant Taylors' Co. v. Attorney General*, L. R. 6 Ch. 512; *Attorney General v. Wax Chandlers' Co.*, L. R. 6 H. L. 1; *Goodman v. Mayor of Saltash*, 7 App. Cas. 633; *Stanley v. Colt*, 5 Wall. (U. S.) 119; *Jones v. Habersham*, 107 U. S. 174; *Rolphe etc. Asylum v. Lefebvre*, 69 N. H. 238; *Ashuelot Nat. Bk. v. City of Keene*, 74 N. H. 148; *Mills v. Davison*, 54 N. J. Eq. 659; *MacKenzie v. Trustees of Presbytery*, 67 N. J. Eq. 652; *Greene v. O'Connor*, 18 R. I. 56.

So also by language appropriate to the creation of a condition an equitable charge may be created. *Re Oliver*, 62 L. T. 533. See sec. VII., *post*.

SECTION VI.

*A Trust distinguished from a Mortgage or Pledge.*WEHRLE *v.* MERCANTILE NATIONAL BANK
OF SALEM.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1915.

221 Mass. 585.

RUGG, C. J. This case comes before us on appeal from a decree dismissing the bill after an order sustaining a demurrer. The material averments are that, in 1878, Rebekah K. Jacobs indorsed and delivered to the firm of James O. Safford and Company twenty-six shares of stock of the defendant bank as collateral security for notes made by her for the accommodation of her son. The stock subsequently was transferred to the name of the firm and has been held by them. In 1881, one Choate was appointed assignee of the estate of Mrs. Jacobs, who had been adjudged insolvent. In 1884, Safford and Company executed and delivered a full release of all claims against the son, and a year later the surviving partner acknowledged full settlement of all claims against Mrs. Jacobs in the insolvency proceedings against her, and that the indebtedness as security for which the stock had been transferred was paid in full in 1884 or 1885. Choate, the assignee in insolvency of the estate of Mrs. Jacobs, died in 1890 and there was no assignee of her estate until the plaintiff was appointed in his stead in 1912. This suit in equity is brought to recover the twenty-six shares of bank stock and the dividends which have accrued thereon. The bill was filed in March, 1913, twenty-eight years after it is averred that the debt for which the stock was deposited as collateral was paid.

The parties defendant are the bank whose shares of stock are sought to be recovered, the surviving partner of Safford and Company, who has deceased since the bringing of the suit and whose administrators defend, and the administrator of the estate of the other partner. The demurrer sets up the statute of limitations, laches, and staleness of the plaintiff's demand.

It is not necessary to determine whether the right of action of a pledgor to recover the pledge accrues without demand and at once upon the satisfaction of the claim to secure which the pledge

was deposited. See *Hancock v. Franklin Ins. Co.* 114 Mass. 155, 156, and *Currier v. Studley*, 159 Mass. 17. If it be assumed in favor of the plaintiff, without so deciding, that a demand sometimes may be necessary, the delay in making the demand and in bringing the action in the case at bar is so great that he cannot prevail. The right to make the demand, if one was necessary, came into existence at latest in 1885. The subsequent death of the assignee of Mrs. Jacobs and a considerable interval before the appointment of his successor did not suspend the effect of the efflux of time. In this respect the rule of the statute of limitations must apply. If time begins to run when competent parties are in existence to represent both sides of the controversy, it continues to run notwithstanding the death or disability of the person whose rights may be barred. *Ballard v. Demmon*, 156 Mass. 449, 453. *Hogan v. Kurtz*, 94 U. S. 773, 779. *Bower v. Chetwynd*, [1914] 2 Ch. 68, 76.

It was said by Mr. Justice Sheldon, speaking for the court, in *Whitney v. Cheshire Railroad*, 210 Mass. 263, at page 268, with ample citation of authorities, "The rule has been laid down that where a demand is necessary to fix the legal rights of a party and give a complete cause of action, the demand ordinarily must be made within the time limited for bringing an action at law." The plaintiff contends that this rule is confined in its operation to cases where an executory contract calls for the performance of some act upon demand. But while many instances where it has been invoked are of that nature, the rule is general in its scope and applies commonly where no fiduciary relation exists. An indeterminate bailment is distinguishable. *Wilkinson v. Verity*, L. R. 6 C. P. 206.

That principle governs the present case. While a pledge sometimes has been spoken of as in the nature of a trust, *Newton v. Fay*, 10 Allen, 505, 507, strictly it has not the legal characteristics of a trust and a transaction like that here shown is a pledge with the incidents attaching to that well recognized relation. *Gamson v. Pritchard*, 210 Mass. 296. *Shaw v. Sillo-way*, 145 Mass. 503. The lapse of twenty-eight years without any excuse other than appears upon the face of this bill is fatal to the maintenance of this suit. There is nothing to indicate fault on the part of the defendants in this respect or any conduct by deception or otherwise to prevent seasonable action by the plaintiff. It is not the province even of equity to afford relief against the natural consequences of such protracted slumber

upon rights of the character here alleged. *Kase v. Burnham*, 206 Penn. St. 330. *Gilmer v. Morris*, 80 Ala. 78, 83. *Mackall v. Casilear*, 137 U. S. 556, 566. *Waterman v. Brown*, 31 Penn. St. 161. See *Brown v. Bronson*, 93 App. Div. (N. Y.) 312. The case has been ably presented in behalf of the plaintiff, but the best argument is unavailing upon these facts.

*Decree affirmed with costs.*¹

¹ There is not a fiduciary relationship existing between a mortgagee and mortgagor such as exists between a trustee and *cestui que trust*. See *Dobson v. Land*, 8 Hare 216; *Shaw v. Foster*, L. R. 5 H. L. 321; *Field v. Debenture Corporation*, 12 T. L. R. 469; *King v. State Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 1, 7; *Dennett v. Tilton*, 227 Mass. 299.

So also in the case of a contract for the sale of land, although the vendor is sometimes spoken of as trustee for the purchaser (*Green v. Smith*, 1 Atk. 572; *Lysaght v. Edwards*, 2 Ch. D. 499; *Phillips v. Silvester*, L. R. 8 Ch. 173), he is not really a trustee, for there is no fiduciary relationship between the parties. *Shaw v. Foster*, *supra*; *Re Lynders*, [1910] 1 I. R. 231. See *Raynor v. Preston*, 18 Ch. D. 1, 10; 9 Harv. L. Rev. 117 n. And of course the purchaser, though sometimes said to be trustee of the purchase-money (*Green v. Smith*, 1 Atk. 572), is not a trustee in any sense.

In *Dobson v. Land*, 8 Hare 216, the court said (p. 220): "Now, that a mortgagee is in some sense a trustee for the mortgagor, may be admitted; for every person in whom the legal estate is vested, with a beneficial interest for another person, in a sense, is a trustee for that person. . . . A trustee can never make a benefit to himself by any dealing with the trust property; but if a second mortgagee should buy in the first mortgage for half its amount, or even obtain an assignment without consideration from the first mortgagee, I can have no doubt he would be entitled to charge the mortgagor with the full amount of the first mortgage in addition to his own."

In *Taylor v. Russell*, [1892] A. C. 244, Lord Herschell said (p. 255): "No authority was cited for the proposition that a mortgagee is, subject to his security, a trustee of the legal title for the mortgagor. The rights of a mortgagor are no doubt well established in a court of equity. He may redeem the mortgage, and no dealings with the property by the mortgagee, save a conveyance under the power of sale, can deprive him of this right. But it is quite a different proposition and one which I think is wholly untenable to assert that a mortgagee is trustee for the mortgagor. It is admitted that a mortgagee may create such estates as he pleases, he may convey, by way of sub-mortgage, to whom and in as many parcels as he pleases."

If one lends money and takes a mortgage in the name of a trustee, there is no fiduciary relation between the trustee and the mortgagor. *Dennett v. Tilton*, 227 Mass. 299. But a trustee under a deed of trust in the nature of a mortgage (*e.g.* one securing a bond issue) stands in a fiduciary relation to the debtor as well as to the creditors.

SECTION VII.

A Trust distinguished from an Equitable Charge.

JACQUET v. JACQUET.

CHANCERY. 1859.

27 Beav. 332.

THE testator was resident in Jamaica. He had two plantations, called "Content" and "Epsom." By his will, dated in 1832, the testator requested his executors to "pay and discharge his funeral expenses and all just and legal demands that might be against him," "with the payment of which (he said) I do charge and make liable all my property in Jamaica both real and personal," &c. "It is my desire, and I do hereby direct, that my executors hereinafter named, or such of them as shall qualify under this my will, do dispose of the freehold of Content plantation, with the buildings thereon," &c., "the moneys arising from the sale thereof to be applied to the liquidation of my debts, and the overplus (if any) to fall into the residue of my estate. All the rest, residue and remainder of my property in Jamaica, but subject to the payment of my debts and legacies comprised of Epsom plantation" &c., "and everything else on the plantation or elsewhere in Jamaica, of whatsoever nature and kind," he gave, devised, and bequeathed to certain persons whom he named.

The testator died in 1834, and in 1843 the plantations were sold to Philip Jacquet and the money was in court. The Chief Clerk found that a debt of 318*l.* was still due to Spicer, and that he had a claim to that amount on the trust funds. The question was, whether the real estate was charged with the debt, and whether his remedy against the estate and the produce was or [was] not barred by the Statute of Limitations.

The plaintiff took out a summons to vary the certificate by finding that he had no claim on the trust funds.

THE MASTER OF THE ROLLS [ROMILLY.] I think that this will created a trust for the payment of debts as regards the Content plantation; but with respect to the other plantation there is a mere charge of debts. I am of opinion that the statute does not apply as regards the Content estate; but I wish to consider whether the transaction of 1843 amounted to a sale to

Mr. Philip Jacquet, in consideration of his paying a sum of money into court; because, if it did, I am of opinion that the fund is affected by the trusts specified by the will, and is now applicable to the payment of the debts.

I came to the conclusion that the debts were charged on the whole of the property, but the trust was limited to the Content estate, which the testator directed to be sold by his executors, and the produce applied in payment of his debts. The testator died in 1834, and, under the Statute of Limitations, passed in 1837, the lapse of twenty years bars any power of recovery in respect of the charge, but it does not bar the right of recovery as regards the Content estate, as to which a trust was created.

I think the result of the transaction in 1843 is, that Philip Jacquet is the purchaser for value of the Content estate, and from that time the statute begins to run in his favor under the 25th section of 3 & 4 Will. IV. c. 27; but as against the produce of the Content estate, the statute does not apply, and it remains liable for the payment of the testator's debts. I cannot make out how much of the fund in court is attributable to the Content estate, and that must be ascertained by an inquiry.

I will, however, make this declaration: that so much of the money now in court as is properly attributable to the purchase of the Content estate, under the deed of 1843, is applicable to the payment of Mr. Spicer's debt.¹

¹ *Francis v. Grover*, 5 Hare 39; *Proud v. Proud*, 32 Beav. 234; *Dickenson v. Teasdale*, 1 De G. J. & S. 52; *Cunningham v. Foot*, 3 App. Cas. 974; *Re Oliver*, 62 L. T. 533; *Re Barker*, [1892] 2 Ch. 491; *Re Lacy*, [1899] 2 Ch. 149; *Dundas v. Blake*, 11 Ir. Eq. 138; *Re Hazlette*, [1915] 1 I. R. 285; *Re Mitchell*, 182 Pa. 530, *accord*.

For cases in which it was held that a trust was created and that the claimant was not barred by the Statute of Limitations, see Ames 57 n.

By the Real Property Limitation Act, 1833 (3 & 4 Will IV. c. 27), it was provided as follows:

Sec. 24. "No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which . . . he might have made an entry or distress or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity."

Sec. 25. "Provided . . . that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent shall be deemed to have first accrued . . . at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall

PERSONAL LIABILITY OF DEVISEE. Where land is devised to A, "he paying," or "on condition that he pay," a certain sum of money to B, B acquires a twofold right, the one an equitable charge upon the land, the other a money claim against A. And this claim against A is enforced at common law by an action of Debt, or *Indebitatus Assumpsit*, although B was a stranger to the transaction. *Ewer v. Jones*, 2 Ld. Ray. 934, 2 Salk. 415, 6 Mod. 26 (*semble*); *Webb v. Jiggs*, 4 M. & Sel. 113, 119 (*semble*); *Braithwaite v. Skinner*, 5 M. & W. 313 (*semble*); *Re M'Mahon*, [1901] I. R. 489; *Harland v. Person*, 93 Ala. 273; *Williams v. Nichol*, 47 Ark. 254; *Dunne v. Dunne*, 66 Cal. 157; *Lord v. Lord*, 22 Conn. 595; *Olmstead v. Brush*, 27 Conn. 530; *Burch v. Burch*, 52 Ind. 136; *Porter v. Jackson*, 95 Ind. 210; *Felch v. Taylor*, 13 Pick. (Mass.) 133; *Adams v. Adams*, 14 Allen (Mass.) 65 (but see *Prentice v. Brimhall*, 123 Mass. 291, 293); *Stringer v. Gamble*, 155 Mich. 295 (*semble*); *Smith v. Jewett*, 40 N. H. 530, 535; *Gridley v. Gridley*, 24 N. Y. 130; *Brown v. Knapp*, 79 N. Y. 136; *Redfield v. Redfield*, 126 N. Y. 466; *Etter v. Greenawalt*, 98 Pa. 422; *Jordan v. Donahue*, 12 R. I. 199 (*semble*). See 30 L. R. A. (N.S.) 815; Ames, 3.

In *Zimmer v. Sennott*, 134 Ill. 505, and in *Miltenberger v. Schlegel*, 7 Pa. 241, there was said to be a claim against the devisee, but no equitable charge upon the land.

| If the testator shows an intention merely to charge the land and not to impose a personal liability upon the devisee, as where the devise is simply "subject to" a payment, the devisee is not personally liable. *Jillard v. Edgar*, 3 De G. & S. 502; *Re Cowley*, 53 L. T. 494; *Den v. Small*, 20 N. J. L. 151.

then be deemed to have accrued only as against such purchaser and any person claiming through him."

Sec. 40. "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same. . . ."

By the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), sec. 8, the period of twenty years specified in Stat. 3 & 4 Will. IV c. 27 was reduced to twelve years. And by sec. 10 of this Act it was provided that no money or legacy charged on land or rent, though secured by an express trust, should be recoverable except within the time within which it might have been recovered had there been no express trust.

Prior to these statutes, there was no Statute of Limitations as to equitable charges. *Collins v. Goodall*, 2 Vern. 235; *Crallan v. Oulton*, 3 Beav. 1.

On the question whether a subsequent transferee is liable, see *Swasey v. Little*, 7 Pick. (Mass.) 296; *Sheldon v. Purple*, 15 Pick. (Mass.) 528; *Jordan v. Donahue*, 12 R. I. 199; and especially *Hodges v. Phelps*, 65 Vt. 303.

In *Millington v. Hill*, 47 Ark. 301, *Loder v. Hatfield*, 71 N. Y. 92, and *Yearly v. Long*, 40 Oh. St. 27, a devise of land charged with an annuity was so worded as to impose upon the devisee a personal liability in the nature of a debt. It was held that, as soon as the statute barred the personal claim, the right to enforce the equitable charge was also barred. But see *contra*, *Stringer v. Gamble*, 155 Mich. 295, in which the court said, (p. 299): "There is no undertaking of the devisee to pay the annuity although he became liable to do so by accepting the devise. The lien did not exist to secure the liability thus arising, but it did exist to secure, out of the land itself, the benefit intended for the [equitable incumbrancer]." See *Balz v. Kircher*, 192 Pa. 63.

The testator may charge simply the rents and profits of the land. *Nudd v. Powers*, 136 Mass. 273 (and cases cited). In that event the devisee is not personally liable, nor will the land be sold to pay the amount charged thereon.

DOWNER v. CHURCH.

COURT OF APPEALS, NEW YORK. 1871.

44 N. Y. 647.

THIS action was brought to compel the specific performance of a contract between the plaintiff and the defendant Loren Church. It appears from the facts found by the referee that Roswell Downer died in January, 1857, leaving a widow but no child. By his will he devised all his property to Church, charging it with the support and maintenance of his widow during her life. The plaintiff, a nephew and one of the heirs of the deceased, informed the defendant Church that the heirs of the deceased claimed the estate and would contest his title. The plaintiff and the defendant Church thereupon entered into the agreement in writing involved in this action, whereby in order to settle the controversy without resort to law, the plaintiff agreed on behalf of himself and the other heirs to accept from Church a deed of the five acres of land occupied by Roswell Downer at his death, and certain other property which Church

agreed to convey to the plaintiff. The plaintiff agreed to procure from all the heirs a release of all their claims to the estate of the deceased. He was not to be required to procure any release from the widow of Roswell Downer, and her rights and interests were not to be affected, but to remain the same; except that she was not to have any right or claim to the property so to be conveyed to the plaintiff. Church executed and delivered in escrow to one Symonds a deed to the property. The plaintiff procured the releases as agreed, but the defendant refused to order Symonds to give the deed to the plaintiff.

The referee found, as conclusion of law, that the defendant had violated his contract in the particulars above mentioned, and adjudged a specific performance with costs. The defendants, Church and wife, duly excepted; and on appeal to the General Term of the Supreme Court, the facts and conclusions of law to which exceptions had been taken were fully reviewed and affirmed, with cost.

The defendants, Church and wife, thereupon appealed to the Court of Appeals.¹

LEONARD, C. There can be no doubt of the validity of the agreement to compromise the hostile and conflicting claims of the plaintiff and defendant, as between themselves. The defendant Church argues that the property devised to him is charged with a trust for the maintenance of the widow of Roswell Downer, the deceased testator, and hence that he cannot legally convey it as he had agreed. The provision of the will, as stated in the case, is that the property is devised to Loren Church, subject to the support and maintenance of the widow. This language does not create a trust, it creates an encumbrance. The title to the property devised is vested in Church, charged with the support of the widow, as an encumbrance. There is no difficulty in his conveying such title as he has. The plaintiff takes it subject to the charge contained in the instrument creating the title in the defendant. The facts, as they are found by the referee, show no hardship or injustice in requiring the defendant to deliver the papers deposited in escrow with Mr. Symonds. The plaintiff has fully performed his part of the agreement, at some expense and loss of time, and there is no hardship or injustice in requiring the defendant to complete the performance of it on his part. The hardship and injustice would be the other way, if the defendant is not held to his

¹ The statement of facts is abridged and a part of the opinion is omitted.

contract, in damages or by its due performance. The facts do not support the defendant's position. There is no trust as to the property. . . .

All concurred.

*Judgment affirmed, with costs.*¹

In *KING v. DENISON*, 1 Ves. & B. 260, Lord ELDON said (pp. 272, 276): "I will here point out the nicety of distinction, as it appears to me, upon which this court has gone. If I give to A. and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. Where therefore the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir; but, where the whole legal interest is given for a particular purpose, with an intention to give to the devisee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose, the surplus goes to the devisee, as it is intended to be given to him. . . . There is a great difference here between a devise upon trust and a devise subject to a charge; but the object is effected much in the same way, compelling the party to make good the charge, or trust, by very similar operations, as applied in this court." See *Re West*, [1900] 1 Ch. 84, *post*.

¹ *Jillard v. Edgar*, 3 DeG. & S. 502, *accord*. But if the devisee sells to a purchaser for value without notice of the charge, the devisee is liable to the equitable encumbrancer. *Ibid.* (*semble*).

If the owner of land and a building thereon charged with the payment of a legacy insures the building, which is subsequently destroyed, and collects the insurance money, the charge does not attach to the insurance money. *Whitehouse v. Cargill*, 88 Me. 479.

A devisee of land subject to an annuity in favor of A, unlike a trustee for A, may buy the annuity of A as freely as any one else. *Powell v. Murray*, 2 Edw. (N. Y.) 636, 644-645.

An equitable charge is not within the exemption in favor of beneficiaries under the so-called spendthrift trusts. *DeGraw v. Clason*, 11 Paige (N. Y.) 136. See also *Matthews v. Studley*, 17 N. Y. App. Div. 303.

SECTION VIII.

A Trust of a Chose in Action distinguished from an Assignment.

HAMMOND v. MESSENGER.

CHANCERY. 1838.

9 Sim. 327.

THE VICE CHANCELLOR [SHADWELL].¹ If this case were stripped of all special circumstances, it would be simply a bill filed by a plaintiff who had obtained from certain persons to whom a debt was due a right to sue in their names for the debt. It is quite new to me that, in such a simple case as that, this Court allows, in the first instance, a bill to be filed, against the debtor, by the person who has become the assignee of the debt. I admit that, if special circumstances are stated, and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor, the creditor will interfere and prevent the exercise of that right, this Court will interpose for the purpose of preventing that species of wrong being done; and, if the creditor will not allow the matter to be tried at law in his name, this Court has a jurisdiction, in the first instance, to compel the debtor to pay the debt to the plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor.

If bills of this kind were allowable, it is obvious that they would be pretty frequent; but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances.

The only question then is, whether, on this record, there are any special circumstances which create a ground for a court of equity to entertain the bill against the debtor.

The bill sets out with a statement that a partnership was carried on between Wilks and Wooller; and a variety of instruments and transactions are stated, the result of which was, that the partnership was to be dissolved, that the plaintiff was to pay the debts due from the partnership, and to be entitled to the partnership assets. Then it represents that Messenger, the

¹ The statement of facts and a portion of the opinion are omitted.

demurring party, at the time of the agreement for the dissolution of the partnership, was justly indebted to the firm in the sum of 80*l.* for coal and coke sold and delivered to him by the firm, and that Messenger is now indebted to the plaintiff in the said sum of 80*l.* as the assignee of such debt. Therefore the debt in question was, purely, a debt recoverable at law. Then the bill states a notice given to Messenger by the plaintiff to pay the debt to him. It then states that on the 2d of October the plaintiff called on Messenger, and applied to him for payment of the sum of 80*l.*, and fully apprised him of the plaintiff's right and title to demand and receive payment of it from him; that Messenger, for the first time, pretended that the plaintiff was not entitled to receive the debt, but that he was bound to pay it to Wilks and Wooler. That, of itself, creates no equitable ground.

The bill then alleges, in the usual manner, that the plaintiff had applied to Messenger for the payment of the debt, and that Messenger, combining and confederating with Wilks, had refused so to do, and pretended that there was no such debt: that, however, gives no equity. Then it charges that Messenger, on receiving notice of the plaintiff's right and title to the debt, became and still was a trustee of it for the plaintiff. That again does not make him a trustee, that is to say, such a trustee as the plaintiff has a right to sue in equity, unless the whole circumstances of the case taken together, do show that the plaintiff has a right to sue in equity. . . .

When I come to the prayer, I find that it, first of all, prays, "that Messenger may be decreed to pay to the plaintiff the sum of 80*l.*, so due to the firm of Wilks and Wooler as aforesaid, or, if necessary, that an account may be taken." Now no case whatever is stated to show the necessity for an account, and therefore it must, of necessity, stand as a mere prayer that Messenger may be decreed to pay the debt. It then proceeds as follows: "or that the plaintiff may be at liberty to use the name of the defendants, Wilks and Wooler, in an action at law to be brought by him against Messenger." There is, however, no case stated which shows that Wilks & Wooler have at all interfered to prevent, or that they intend to prevent the plaintiff from using their names at law. . . .

It seems to me that this case is altogether denuded of those special circumstances, the existence of which is the only ground for this Court to lend its aid to a party who, like the plaintiff,

has taken an assignment of a debt; and, consequently, the demurrer must be allowed.¹

Demurrer allowed, with liberty to the plaintiff to amend his bill.

FRANCIS B. FOGG, AND MARY, HIS WIFE, v. JOHN
IZARD MIDDLETON AND HENRY MIDDLETON.

COURT OF APPEALS, SOUTH CAROLINA. 1837.

2 Hill Ch. 591.

MRS. MARY MIDDLETON, in her lifetime, conveyed by deed to her second son, Mr. J. I. Middleton, her large real estate; and by a will, purporting to be her last will and testament, disposing of her personal estate, bequeathed the greater part thereof between her two sons, and gave considerable pecuniary legacies (as is alleged, and which does not seem to be contradicted) to each of her daughters (except Mrs. Manigault, who was dead). Afterwards, she executed another will, and died in 1814, leaving the same in full force, by which she disposed of the bulk of her personal estate to her two sons, subject to certain legacies, and particularly a legacy to each of her daughters of 100*l.* sterling, which was greatly below the legacies under the former will.

The personal estate of Mrs. Middleton was appraised at upwards of seventy-one thousand dollars.

Some discontents naturally arose in the minds of daughters

¹ *Western Union Tel. Co. v. Ryan*, 126 Ga. 191; *Fultz v. Walters*, 2 Mont. 165, *accord.* See also *Ames*, 60*n*; 5 Corp. Jur. 997, 998.

In the code states the assignee is allowed to sue in his own name, as a result of the general provision that actions shall be brought in the name of the real party in interest. *Pomeroy*, Code Remedies, 4 ed., 87.

In many other states it is expressly provided by statute that an assignee of a *chose* in action may sue in his own name. See 30 Harv. L. Rev. 105. Cf. Judicature Act, 1873 (36 & 37 Vict. c. 66) sec. 25 (6), *post* p. 169.

In special cases where an action at law in the name of the assignor is not an available or adequate remedy, the assignee may sue the obligor in equity. This is true where the assignor is a corporation which has ceased to exist (*Lenox v. Roberts*, 2 Wheat. (U. S.) 373; *Person v. Barlow*, 35 Miss. 174); or where the obligor is executor of the assignor (*Hodge v. Cole*, 140 Mass. 116); or where the assignor is dead and no domestic administrator has been appointed (*Cobb v. Thompson*, 1 A. K. Marsh (Ky.) 507); or where the assignor is threatening to collect the claim or release the obligor. See *French v. Peters*, 177 Mass. 568. As to the effect of a marriage between the obligor and assignor, see *MacKeoun v. Lacey*, 200 Mass. 437.

so slightly provided for by a wealthy parent, who bestowed so large a fortune on her sons. . . . These discontents reached the ears of Mr. J. I. Middleton, with the exaggerated report that the use or the abuse of his personal influence over an aged mother had produced the effect of diminishing her bounty to her daughters, by her last will and testament, to his benefit. . . . [Being disturbed by these reports he determined to relinquish the amount to which his sisters would have been entitled under the former will of their mother, and accordingly] executed bonds in trust to his brother, Mr. Henry Middleton, with conditions for the payment of certain sums for the eldest daughter of each of his sisters, and placed them in the possession of his brother, Mr. Henry Middleton. He then went to Europe, about 1817, and has remained there ever since, leaving his estate, including the personal estate, the slaves derived from his mother's will, in the hands of his brother, Henry, as his attorney and agent; and to apply the income of the estate to the payment of the debts of her estate, and the legacies under her will. The debts have been paid, and the bond to Mr. Izard's family has been paid, but no payment has been made on the bond for the obligor's niece, Miss Mary Rutledge, now the wife of Mr. Fogg, the plaintiff. After many years, applications were made, by letters to Mr. Henry Middleton, as the agent and attorney of Mr. J. I. Middleton, for payment, which applications, being unattended to, the bill was filed in this Court, which makes this case. . . .

[CHANCELLOR DE SAUSSURE made a decree for the plaintiffs, from which the defendants appeal.]

CHANCELLOR JOHNSTON.¹ Under the decided cases, the delivery of the bond would have been established upon even less evidence than was furnished on the trial. As it is, the proof fully sustains the Chancellor's conclusion on the fact.

The law of the case seems to admit of little doubt.

Cases have been quoted to show that equity will not aid a mere volunteer, where no legal right has passed, or where the action of this Court is necessary to constitute the relation of trustee and *cestui que trust*.

But the delivery and acceptance of the bond, *ipso facto*, constituted Mr. Henry Middleton trustee. The bond contained his commission, and set forth his duties.

¹ A portion of the opinion is omitted, and the statement of the case is abridged.

It also vested in him the debt of which it was the evidence; and if that debt should be detained, he had a legal remedy to recover it.

Wherever a trustee has accepted a trust, he is bound to a diligent discharge of his duties. If he holds choses in action, with a clear remedy on them, it is unfaithful in him not to endeavor to enforce them. If he holds a bond, even although that bond is a free gift, he has no right to remit it.¹

It never was the law that a trustee was not as amenable to a volunteer *cestui que trust* as to one who is not a volunteer. If that were the law, no executor would be accountable to collateral legatees.

So that, without going further than Mr. H. Middleton, the plaintiffs have a right to come here to compel him to perform his trusts.

But if he is liable, it results that he may be compelled also to surrender to his *cestui que trusts* all the legal remedies he possesses. And this puts the plaintiffs in possession of the bond, to all intents, as if it had been drawn to them as obligee, or assigned to them.

If it had been drawn to the plaintiffs by Mr. John Iazard Middleton, or assigned to them by Mr. Henry Middleton, will it be pretended that the plaintiffs could not recover from the obligor, even if it was given on no consideration? If it had been given on a consideration, which failed, that would be a good defence. But the original want of consideration would be none. . . .

If the Court, in this case, travels beyond the case of the *trustee* and *cestui que trusts*, and takes cognizance of the liabilities of the obligor, it is at the instance of the defendants, who insisted on his being made a party. Being here at his own instance, the Court will, to prevent circuity of action, decree against him what he would have been liable to pay the defaulting trustee or what the plaintiffs could recover if the bond had been assigned to them.² . . .

¹ *Gordon v. Small*, 53 Md. 550. See *Fletcher v. Fletcher*, 4 Hare 67, *post*.

² The right of a *cestui que trust* of an obligation to have a subpoena against his trustee, who refused to enforce the claim, has been recognized from very early times: (1391) 3 Rot. Parl. 297; Y. B. 2 Ed. IV. 2-6; *Rose v. Clarke*, 1 Y. & C. C. C. 534, 548; *Re Uruguay Co.*, 11 Ch. D. 372 (*semble*); *Thompson v. R. R. Co.*, 6 Wall. 134; *N. Y. Co. v. Memphis Co.*, 107 U. S. 205; *Morgan v. Kansas Co.*, 21 Blatchf. 134; *Doggett v. Hart*, 5 Fla. 215; *Mason v. Mason*, 33 Ga. 435; *Forrest v. O'Donnell*, 42 Mich. 556; *Western Co. v. Nolan*, 48 N. Y. 513; *Wetmore v. Porter*, 92 N. Y. 76 (*semble*); *Crosby v.*

The motion is dismissed.

Chancellors JOHNSON and HARPER concurred.

Chancellor DE SAUSSURE absent, from indisposition.

COPE *v.* PARRY.

CHANCERY. 1821.

2 J. & W. 538.

W. COPE, in his marriage-settlement, covenanted with Jones, a trustee, to surrender to him a copyhold estate, to hold to the uses of the settlement. Cope being dead, the bill was filed by the persons interested under the settlement, against the Defendant, who had purchased the estate, as it was stated, with notice, to compel a performance of the covenant.

Mr. *Benyon* and Mr. *Gardner*, for the Defendant, objected that Jones, the trustee, ought to have been made a party. They cited Attorney General *v.* Green, 2 Bro. C. C. 492, and *Cooke v. Cooke*, 2 Vern. 36, where it was held that in a bill for the specific performance of a covenant entered into with A. in trust for B., A. must be a party.

Mr. *Heald* and Mr. *Parker*, for the Plaintiffs.

THE LORD CHIEF BARON said, that the effect of the surrender,

Bowery Bank, 50 N. Y. Sup'r Ct. 453; *Phoebe v. Black*, 76 N. C. 379. See also *Sandford v. Jodreu*, 2 Sm. & G. 176.

But for some time the *cestui que trust* could proceed only against his trustee: *Dhegetoft v. London Co.*, Mosely 83, affirmed in 4 Bro. P. C. (Toml. ed.) 436; *Fall v. Chambers*, Mosely 193; *Motteux v. London Co.*, 1 Atk. 545, 547.

Now, however, the beneficiary is allowed, on the principle of avoiding multiplicity of actions, to join the obligor as a defendant with the recusant trustee: *Fletcher v. Fletcher*, 4 Hare 67; *Gandy v. Gandy*, 30 Ch. Div. 57; [*Kelly v. Larkin*, [1910] 2 I. R. 550;] *Alexander v. Central R. R.*, 3 Dill. 487; *Owens v. Ohio Co.*, 20 Fed. 10; *Billings v. Aspen etc. Co.*, 52 Fed. 250; *Mangels v. Donau Brewing Co.*, 53 Fed. 513; *Reinach v. Atlantic etc. Co.*, 58 Fed. 33 (if neither trustee nor obligor is a citizen of the same state as the *cestui que trust*, the suit may be brought in a federal court); *Mason v. Mason*, 33 Ga. 435 (*semble*); *Wright v. Mack*, 95 Ind. 332; *Hale v. Nashua Co.*, 60 N. H. 333; *De Kay v. Hackensack Co.*, 38 N. J. Eq. 158; *O'Beirne v. Alleghany etc. Co.*, 151 N. Y. 372; *Davies v. N. Y. Co.*, 41 Hun 492. See, further, the analogous cases of proceedings in equity against an executor and a debtor of the testator: *Barker v. Birch*, 1 DeG. & Sm. 376; or against a guardian and a debtor to the ward's estate: *Mesmer v. Jenkins*, 61 Cal. 151; *Frost v. Libby*, 79 Me. 56. — AMES.

if the Court decreed it, would be to give Jones the legal estate. He ought, therefore, to be a party; otherwise another suit might become necessary against him.¹ . . .

THOMASSEN v. VAN WYNGAARDEN.

SUPREME COURT, IOWA. 1885.

65 Iowa 687.

ACTION in equity to foreclose two mortgages. From the decree the plaintiff appeals.

SEEVERS, J. The defendant Wyngaarden executed the following promissory note:

"\$1,400.

Pella, Iowa, November 11, 1878.

"Six years after date, for value received, I promise to pay to Jantie Van Wyngaarden, in trust for Gertruda Geradina Thomassen, Jana Thomassen, Wilhemina Thomassen, Johannes Thomassen, and Jan Thomassen, heirs of Maarke Thomassen, deceased, or order, the sum of fourteen hundred dollars, payable at the First National Bank, Pella, Iowa, with interest, payable annually, at the rate of six per cent per annum from date until paid. Interest when due to become principal and draw ten per cent, and an attorney fee of ten per cent if suit is commenced on this note."

The mortgages were given to Jantie Van Wyngaarden in trust for the beneficiaries named in the note. . . . It was pleaded as a defence that the interest up to that time had been paid. The mortgages provided that, in the event the interest was not paid as therein provided, then the whole debt became due. The beneficiaries are grandchildren of Jantie Van Wyngaarden, and are minors, and the plaintiff is their guardian. This suit was commenced in March, 1882, and the court found that there was nothing due at that time. . . .

I. Counsel for the appellant insist that there is no sufficient

¹ See *Head v. Ld. Teynham*, 1 Cox 57; *Wood v. Williams*, 4 Madd. 136.

When a life insurance policy is payable to the insured or his executors for the benefit of the wife and children of the insured, the executor is the proper party to sue. *Mass. Mut. Life Ins. Co. v. Robinson*, 98 Ill. 324.

As to the rights of the *cestui que trust* when the trustee is not subject to the jurisdiction of the court, see *Amparo Mining Co. v. Fidelity Trust Co.*, 75 N. J. Eq. 555; *Ettlinger v. Persian Rug etc. Co.*, 142 N. Y. 189, *post*.

evidence showing that the interest due on the note up to January, 1882, has been paid. . . .

The defendants introduced in evidence a receipt in the following words, and proved that it was executed by the trustee:

“Pella, Iowa, December 22, 1880.

“Received of Jan Van Wyngaarden the sum of one hundred and forty-seven dollars, as interest on a certain note, secured by mortgage, to me given by the said Jan Van Wyngaarden in trust (for the beneficiaries above named); this being in full up to January 1, 1882.

“JANTIE VAN WYNGAARDEN.”

Counsel for the plaintiff insist that the receipt is signed by the trustee as an individual, and therefore the beneficiaries are not bound thereby. But we think it fairly appears from the receipt itself that the money was received by the trustee as such. It was paid to and received by the person to whom it was payable by the terms of the note, and she will be charged as having received it in her capacity as trustee. . . .

II. Counsel for the appellant insist that the trust created by the execution of the notes and mortgages is a simple or dry trust, and that the trustee in such a trust does not have the power to manage and dispose of the trust estate, and therefore the beneficiaries are not bound by what the trustee did. A simple or dry trust is defined to be one “where property is vested in one person in trust for another, and the nature of the trust, not being prescribed by the donor, is left to the construction of the law.” Perry, Trusts, §520. “There can be but few of these dry trusts; for, when there is no control, and no duty to be performed by the trustee, it becomes a simple use, which the statute of uses executes in the *cestui que trust*, and he thus unites both the legal and beneficial estate in himself.”

The trust under consideration is materially different; for it is so far declared as to cast on the trustee a duty for the performance of which she will be held accountable. It is made the duty of the trustee to receive and collect the interest and the principal when it becomes due. The legal title to the note and mortgages is vested in the trustee. It is her duty to preserve and protect the interest of the beneficiaries. But, in the absence of fraud or collusion, the trustee could satisfy the mortgages and acknowledge satisfaction of the debt, which would be binding on the beneficiaries. It is said that any one dealing with the trustee

must see that money paid in the discharge of the trust was properly appropriated; but we do not think this is so, for the simple reason that the trustee was the legal owner of the note, and authorized to receive payment of both the principal and interest. An administrator in one sense is a trustee for the estate he represents; and yet he is the legal owner of the notes and mortgages belonging thereto. A person making him a payment is not bound to see that the money is properly accounted for.

The rule, it seems to us, should be the same in the case under consideration.

*The decree of the Circuit Court must be affirmed.*¹

SUPREME LODGE, KNIGHTS OF PYTHIAS v.
RUTZLER, TRUSTEE.

COURT OF ERRORS AND APPEALS, NEW JERSEY. 1917.

87 N. J. Eq. 342.

PARKER, J. The suit would be essentially one of interpleader except for the fact that complainant before filing its bill had already paid over the fund to one of the claimants and sought by the bill to be protected in that course, and to secure an injunction against the further prosecution of a suit at law by the other claimant.

The fund was the proceeds of a death benefit certificate issued by the complainant to Henry B. Lupton in his lifetime. At the time of his death it was payable to "his daughter Lillian M. Rutzler as trustee for his daughter Florence S. Lupton." Florence survived her father, but died before the money was paid, and this raised the question whether Lillian, as "trustee," was entitled to the money, or Florence's mother, Anna, who had taken out letters of administration of Florence's estate. The complainant finally paid the money to Anna, as administratrix,

¹ Sayre v. Weil, 94 Ala. 466 (*semble*); Rhodes v. Gauladett, 40 Ga. 212; Munnerlyn v. Augusta Sav. Bk., 88 Ga. 333; Austin v. Thorp, 30 Iowa 376, (*semble*); Sherburne v. Goodwin, 44 N. H. 271; Boone v. Bank, 84 N. Y. 83, 21 Hun 235; Schluter v. Bowery Sav. Bk., 117 N. Y. 125; Knoch v. Van Bernuth, 145 N. Y. 643, *accord*.

But if the obligor pays the payee knowing that the trustee intends to commit a breach of trust he is liable as a confederate in the breach of trust. See Bischoff v. Yorkville Bank, 218 N. Y. 106, *post*.

and, upon Lillian bringing an action at law against complainant on the certificate, filed this bill for an injunction, making the administratrix also a party. On final hearing an injunction was awarded and Lillian appeals.

We are of opinion that the court of chancery properly enjoined the suit at law. On the face of the certificate the trust was a "dry" or passive one. The characteristics of such a trust are so elementary that in all the range of our reported equity decisions I do not find, and counsel do not appear to have found, any direct adjudication of them. In *Cooper v. Cooper*, 36 N. J. Eq. 121, 123, they are described incidentally by Chancellor Runyon, quoting from *Lew. Trusts* (8th ed. § 18) 21. In *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, the disposition of the fund turned on whether the trust was to be held active or passive; and Vice-Chancellor Reed (on p. 194) held that if the trust was passive (i.e., if the trustee had no active duties to perform in respect to the trust estate) he could be called on to convey it to the *cestui que trust* or her appointee. See, also, *Perry, Trusts* § 18; sections 520 *et seq.*, and 39 Cyc. 30, where the classification of trusts into "simple" and "special" is dealt with as synonymous with passive (or dry) and active. As the trustee of a passive trust, the sole duty of Lillian after her father's death and in the lifetime of the sister was to act as a conduit of the money from the complainant to Florence or her appointee. Upon the death of Florence, her personal representative became vested with the same *jus habendi* that Florence had in her lifetime; and, as the vice-chancellor very properly said, if the complainant had paid the money over to the trustee, there was nothing for the trustee to do but to turn it over to the administratrix. As the complainant wished to settle the question who was the beneficial owner of the fund as distinct from the purely legal owner, the litigation was properly transferred into the court of chancery by filing the bill, and properly retained there for the settlement of this equitable question; and the award of an injunction against proceeding further with the action at law was a remedy incidental to the nature of the case and the jurisdiction of the court.¹

¹ If a *chose* in action is assigned by the trustee to a *bona fide* purchaser, and the obligor thereafter pays the *cestui que trust* without notice of the assignment, the obligor is not discharged. *Seymour v. Smith*, 114 N. Y. 481.

As to the effect of a payment by the obligor to the assignor with knowledge of the assignment, see *Jones v. Farrell*, 1 DeG. & J. 208; *Kitzinger v. Beck*, 4 Colo. App. 206; *Chicago etc. Co. v. Smith*, 158 Ill. 417; *Ames*, 63n.

CABLE v. THE ST. LOUIS MARINE RAILWAY
& DOCK CO.

SUPREME COURT, MISSOURI. 1855.

21 Mo. 133.

THIS was an action by the owners of the steamboat James Hewitt, to recover damages for the sinking of said boat by the negligence of the defendant.

At the trial, there was evidence tending to show that, at the time of the loss, there was an insurance upon three-fourths of the boat, and that immediately afterwards, and before the commencement of this suit, the interest insured was by the plaintiffs abandoned to and accepted by the underwriters.

The defendant asked the court to instruct the jury that, in respect to the interest abandoned, the right of action was in the underwriters alone, and that they should have been joined as plaintiffs; and that, in any event, the plaintiffs could not recover more than one-fourth of the value of the boat. These instructions were refused, and after a verdict and judgment for the plaintiffs for the value of the boat, the defendant appealed to this court.

T. T. Gantt, for plaintiff in error. 1. The abandonment operated as an assignment to the underwriters of all the interest of the plaintiffs in the subject insured. (2 Phillips on Ins. (3d ed. of 1853), §§ 1711, 1712, and cases there cited.) 2. It cannot be presumed that the plaintiffs are trustees for the underwriters, and besides, there is no allegation of such a trust in the petition.

John A. Kasson, for defendants in error, insisted that the provision in the code of 1849 that suits shall be brought in the name of the real party in interest did not apply to a case like this, where the cause of action had become divided; that the legal title or claim to the damages was still in the plaintiffs,

As to the effect of a payment without such knowledge, see *Hellen v. Boston*, 194 Mass. 579; *Williston*, Cas. Contracts, 440n.; 5 Corp. Juris. 960; Dec. Dig., Assignments, 93.

In *Roberts v. Lloyd*, 2 Beav. 376, the obligor of a *chose* in action assigned it to one as trustee for others. The obligor made a partial payment to the *cestui que trust*, another partial payment on the trustee's order, and a third partial payment to the executrix of the obligee after having received notice of the assignment. It was held that the obligor was liable for the amount of the third payment, but not for the other amounts.

and a part of the equitable claim, and that therefore the whole action might be sustained in their names.

SCOTT, J. All other questions in this cause have been abandoned except that in relation to the right of the plaintiffs to maintain this action for the entire value of the boat.

There can be no doubt but that the plaintiffs would have been the proper parties to institute this action for the entire sum claimed, had it been brought under our former system of practice. Though there had been an abandonment of the subject insured, and that abandonment accepted by the underwriters, yet the action would have been properly brought for the full value of the boat in their names.

It remains, then, to be seen, whether, under the circumstances of this case, the action is not properly brought in the name of the present plaintiffs, notwithstanding the present practice act. It is not controverted, but is admitted, that a right of action for a portion of the damages arising from the injury to the subject insured, is in the plaintiffs, and that they have a right to recover the value of one-fourth part of the boat, which was lost through the alleged negligence of the defendant.

Now, is there any thing in the present practice act which affects or in any way impairs the rule of the common law against dividing a cause of action, or making two causes of action out of one contract or injury by a division of it. The endorsee of a bill of exchange is the legal owner of it, and regularly a suit upon such an instrument must be brought in his own name. But if the holder of a bill assign by way of endorsement one half of its amount, would not the action, notwithstanding the assignment, still have to be brought in the name of the holder? By our law, the assignee of a bond is the legal owner of it, and suit thereon must be brought in his name. If the obligee of a bond assign one half of the sum of it, could the assignee, although the legal owner, maintain an action in his own name for his portion of the debt? In such a case, would not the suit necessarily be brought in the name of the obligee, who would recover the full amount due on the instrument?

A cause of action arising *ex maleficio*, cannot be used as an illustration of this principle, because neither by the common law nor statute was it assignable, so as to enable an assignee to maintain a suit for the damages in his own name.

We do not consider that the provision in the present practice act, which requires actions to be brought in the name of the

real party in interest, affects this principle of the common law. Under the former practice, and even now, the legal owner of an instrument transferred by assignment must sue in his own name, yet we have seen that the legal owner of a part of a debt secured by a bond, could not maintain an action upon it. It could only be done when he was the assignee of the entire debt. So the statute requiring the real party in interest to sue, should be construed in reference to the principle of the common law above stated, and must be limited to those cases in which the real party in interest possesses the entire cause of action. The original owner of a cause of action cannot, by parting with a portion of his interest in it, give a right of action to his assignee, neither by the common law nor by any thing contained in the present act regulating practice in the courts of justice.

We do not wish to be understood as expressing any opinion as to the manner in which the suit should have been brought had the entire boat been insured by the owners, and they indemnified by their policy.

The other judges concurring, the judgment will be affirmed.¹

¹ Thiel *v.* John Week Lumber Co., 137 Wis. 272, *accord*.

In several states under the code procedure, the partial assignee and assignor are allowed to join as plaintiffs in an action at law against the obligor. *Evans v. Durango Land & Coal Co.*, 80 Fed. 433; *Gangler v. Chicago etc. Ry. Co.*, 197 Fed. 79; *Fireman's Ins. Co. v. Oregon R. R. Co.*, 45 Ore. 53; *Pomeroy*, Code Remedies, 4 ed., 103, 104; 5 Corp. Jur. 1000. See also *Conlan v. Carlow Co. Council*, [1912] 2 I. R. 535. But see *Pelly v. Bowyer*, 7 Bush (Ky.) 513; *Indep. School Dist. v. Indep. School Dist.*, 50 Iowa 322.

It is generally agreed that in the absence of a novation a partial assignee cannot bring a separate action at law or suit in equity against the obligor for his share. *Rivers v. Wright & Co.*, 117 Ga. 81; *Otis v. Adams*, 56 N. J. L. 38; *Carville v. Mirror Films, Inc.*, 178 N. Y. App. Div. 644. Cf. *Forster v. Baker*, [1910] 2 K. B. 636; *Conlan v. Carlow Co. Council*, [1912] 2 I. R. 535. But see *Skipper v. Holloway*, [1910] 2 K. B. 630; *Caledonia Ins. Co. v. Northern Pac. Ry. Co.*, 32 Mont. 46; *Risley v. Phenix Bk.*, 83 N. Y. 318.

In *Hughes-Buie Co. v. Mendoza* (Tex. Civ. App. 1913), 156 S. W. 328, it was suggested that the partial assignee and assignor are joint tenants of the *chose* in action. See a criticism of this case by Professor Williston, 30 Harv. L. Rev. 108. But see 30 Harv. L. Rev. 483.

In general as to the rights of a partial assignee, see Ames, 63n.; 5 Corp. Jur. 894-897, 999, 1000; Dec. Dig., Assignments, 30.

TODD v. MEDING.

COURT OF CHANCERY, NEW JERSEY. 1897.

56 N.J. Eq. 83.

IN MAY, 1893, the Butler Silk Manufacturing Company was indebted to the defendant Madeline A. Roe in the sum of about \$10,000 (witnessed in part by four promissory notes) for money loaned by her to the company. On the 7th of August, 1893, the company being insolvent, the defendant Meding was appointed receiver. At that time the complainant Todd held a promissory note of the company for \$5000, endorsed by Miss Roe, and, in order to secure him, Miss Roe, on the same 7th day of August, executed to him an assignment of a one-half interest of her claim against the company, and Todd agreed that in case the note for \$5000 held by him were paid he would re-assign the one-half interest to her. In September, 1893, the receiver obtained an order calling on the creditors to present their claims. Todd presented a claim based upon the promissory note for \$5000 above mentioned. Miss Roe presented a claim based upon the four promissory notes above mentioned. Both claims were in typewriting with the exception of a special clause in Miss Roe's claim, which was in the handwriting of Mr. (now Governor) Griggs who acted as solicitor for Todd and for Miss Roe, and is in these words:

"Deponent further says that an interest to the extent of \$5000 in said claim has been assigned by her to J. C. Todd as collateral security, and this claim is presented on behalf of the said Todd as well as on her own behalf."

A dividend of twenty per cent. was declared, and the receiver paid Todd \$1,000.37 and Miss Roe \$2,071. The object of the bill is to compel the receiver Meding to make good to the complainant Todd the alleged mispayment to Miss Roe, who is insolvent.¹

PITNEY, V. C. The first question raised at the argument was to whom was the dividend upon the claim of \$10,000, verified by Miss Roe, properly due and payable. It was argued that it was due and payable to Miss Roe because the debt was originally due to her; that the affidavit was made by her, and the receiver

¹ The statement of facts is abridged.

was not bound to notice or act upon any partial assignment of the debt, or, at least, that the notice of the assignment contained in the sworn claim amounted to no more than a mere declaration of trust by Miss Roe which reserved to her the right to receive the dividend as trustee for Mr. Todd and pay it over to him.

The point is thus put in the remarkably able brief of defendant's counsel: "*First*. Treating this as a case of notice from the assignee of a debt to the debtor, Meding is not charged under the circumstances with notice of Todd's right to receive the money instead of Miss Roe."

I am unable to adopt that view. The claim was, on its face, plainly made in favor of Todd to the extent of \$5,000 — just one-half — and in favor of Miss Roe for the remainder. The language used — "this claim is presented on behalf of the said Todd as well as on her own behalf" — will admit of no other interpretation. The express declaration "that an interest in the said claim has been assigned by her to J. C. Todd as collateral," is in and of itself an assignment of so much of the debt, quite independent of the previous formal deed of assignment duly made and executed by her, of which Meding and his counsel had full notice.

An ingenious argument was made to the effect that an assignment as collateral did not vest in the assignee any right to the immediate receipt of the money, and that Todd's right to receive the money from the receiver depended upon the question whether or not the state of the indebtedness, as collateral to which the assignment was made, was such as to entitle him to receive the money as between him and Miss Roe.

But I do not understand such to be the law. Take a simple illustration. If A wishes to borrow money from B, and holds a bond and mortgage of C, which is due, but upon which he cannot immediately realize, and gives his promissory note to B for a sum of money payable at a future day, and assigns the mortgage of C to B as collateral to that note, and before the maturity of the note, C wishes to pay his mortgage, and has notice of the assignment to B as collateral, he cannot, with safety, pay the money to A, the mortgagee. B is entitled to receive the money, although the debt which it is assigned to secure is not yet due. The assignment vests the title to the money in the assignee. The mere fact that it is assigned as collateral, does not alter the situation of the parties. Any other

rule would destroy the value of such an assignment. The fact that the assignment is merely as collateral to a certain debt, does not affect the intrinsic character of the transaction or disentitle the assignee to demand the money, so long as the debt which it is assigned to secure still exists.

The circumstance that only a part of the claim was assigned, does not affect the result. It is too late to dispute the proposition that a part of a debt may be effectually assigned in equity. The qualifying rule that such an assignment cannot be enforced by action at law without the acceptance or assent of the debtor does not vary the result. The qualifying rule avails the debtor only to the extent that if he wishes to dispute the existence of the debt, he is entitled to make his defence in a single suit, and cannot be subjected to several suits at law. But it does not justify him in ignoring the partial assignment, after he has notice of it, and in paying the whole sum to the original creditor. To so hold would be to nullify the doctrine which sanctions partial assignments. The rule is well settled that the payment of the whole debt to the original creditor, after notice of an assignment of part of it, will not avail the debtor when sued in equity by the assignee. If the debtor is in any doubt as to the right of the person claiming to be an assignee, as against the assignor, he has an easy remedy. He can inquire of the original creditor and alleged assignor, and if he denies the assignment the debtor may file his bill of interpleader.

I can find no solid basis for the notion that Miss Roe occupied the position of trustee of a part of this fund for Mr. Todd, with power, as such, to receive the money without his consent. In one sense no doubt she was a trustee, but not in the sense which would give her a legal right to handle the money for his use and benefit and without his consent.

By the old common-law practice the assignee of a negotiable chose in action was obliged to bring suit thereon in the name of the original contractee as nominal plaintiff to his use. But the necessity to use the name of the original contractee as nominal plaintiff did not authorize the payment by the debtor of the amount due to such plaintiff in person, after notice of the assignment.¹ . . .

An examination of the numerous authorities cited by counsel for defendant fails to disclose any which covers the case in hand.

¹ See *Brice v. Bannister*, 3 Q. B. D. 569; *Palmer v. Palmer*, 112 Me. 149; 5 Corp. Jur. 896. But see *Shearer v. Shearer*, 137 Ga. 51.

And I am unable to find any ground upon which the receiver in this case can be relieved and credited with the overpayment to Miss Roe.¹ . . .

SECTION IX.

A Trust distinguished from an Executorship.

SCOTT v. JONES.

HOUSE OF LORDS. 1838.

4 Cl. & Fin. 382.

LORD LYNTHURST.² The facts of the case are extremely simple, and the question resolves itself into a mere question of law. It appears that, in 1815, Messrs. Evans & Jelf carried on business in partnership, as bankers, at Gloucester. In that year they became bankrupts, and their effects were assigned under their commission to assignees in the usual manner. Mr. R. Donovan had a running account with the bank, and there was a balance against him at the time of the bankruptcy to the amount of 26*l.* 4*s.* 3*d.* R. Donovan in the same year made his will, and by that will he disposed of the personal estate he possessed to trustees, for the payment of his debts; and he also devised to the same trustees, what he considered to be his real estate at Tibberton-court; and he directed that in the event of the personal estate not being sufficient to discharge the debts, a sum should be added for that purpose, to be raised by the sale or mortgage of the real estate of Tibberton. He died in the following year; one of the trustees alone proved the will, the other renounced. The trustee who proved the will administered part of the assets and soon afterwards died, and the ultimate administration *de bonis non* was granted to one of the Appellants, the daughter of R. Donovan. . . . The assignees commenced an action against Mrs. Scott, one of the Appellants, and her husband. To this action the defendants pleaded the Statute of Limitations, and there were then no further proceedings taken in the action. There cannot be a doubt, that that was because the Statute of Limitations was a sufficient bar to the action. . . . In consequence

¹ The decision of the Vice Chancellor was reversed in 56 N. J. Eq. 820, on the ground that Todd had not given proper notice to the receiver or made a proper sworn claim in regard to his interest in Miss Roe's claim.

² The statement of facts and a small part of the opinion are omitted.

of that, the present bill was filed, demanding an application of the trust funds in payment of the debts of the testator. The defendants, in their answer to this suit, insist on the Statute of Limitations, and the only question is, whether the trust was of such a nature as to prevent the setting up of such a defence. I have mentioned that the testator considered the estate at Tibberton to be real estate. When sold, however, it turned out to be mere leasehold, and to form part of the personalty. Had it been real estate, in that case the plaintiff would have been entitled to recover, but though part of the personalty, it is said to be taken subject to the trust, and the question is, whether a trust of this description declared of the personal estate, prevents the Statute of Limitations being set up by way of defence, and I am clearly of opinion that it does not, because it does not at all vary the legal liability of the parties, or make any difference with respect to the effect and operation of the statute itself. The executors take the estate subject to the claim of the creditors: they are, in point of law, the trustees for the creditors; the trust is a legal trust, and there is nothing whatever added to their legal liabilities from the mere circumstance of the testator himself declaring in express terms, that the estate shall be subject to the payment of his debts. I conceive therefore, that the circumstance of there being an express trust in this case, does not make any alteration with respect to the question. And if in ordinary circumstances, as to personalty, where there was a mere legal liability, the existence of a mere legal trust would not have been an answer to a plea of the Statute of Limitations; so I conceive that in the present case no alteration can take place, from the existence of an express trust, and that that trust cannot under these circumstances be considered as an answer to the statute. I am of opinion, therefore, that the judgment of the Master of the Rolls was the correct judgment, and that the judgment of the late Lord Chancellor, reversing it, ought to be set aside. As, however, two learned judges have entertained different opinions on this point, the decree of the Court below must be set aside without costs.

*Judgment reversed without costs.*¹

¹ *Freak v. Cranefeldt*, 3 Myl. & Cr. 499; *Evans v. Tweedy*, 1 Beav. 55; *Re Hepburn*, 14 Q. B. D. 394 (*semble*); *Re Stephens*, 43 Ch. D. 39; *Hines v. Spruill*, 2 Dev. & B. Eq. (N. C.) 93; *Man v. Warner*, 4 Whart. (Pa.) 455, *accord*.

Similarly a bequest to an executor upon trust to pay legacies does not

*In re BALLS.*TREWBY *v.* BALLS.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1909.

[1909] 1 Ch. 791.

SWINFEN EADY J.¹ The first question is whether the devise by the testator of his real estate to trustees upon trust for sale, and out of the proceeds to pay his debts, has the effect of preventing those debts from being barred until the expiration of twelve years under the Real Property Limitation Act, 1874, as would have been the case before the Land Transfer Act, 1897 — see *In re Stephens*, 43 Ch. D. 39, — or whether the debts are now barred after six years by the Limitation Act, 1623.

It is contended that as the real estate now passes to the executor, who is entitled and bound to resort to it, if necessary, for the payment of debts, it is in the same position as personal estate.

A trust of personal estate for payment of debts, or a charge of debts on personal estate, does not prevent the operation of the Limitation Act, 1623.

In *Scott v. Jones*, 4 Cl. & F. 382, it was decided that, as the executors took the personal estate subject to the claim of the creditors, the position was not affected or altered by the testator

make the executor a trustee so as to prevent the running of the Statute of Limitations in favor of the executor. *Cadbury v. Smith*, 9 Eq. 37; *Re Rowe*, 58 L. J. Ch. 703; *Re Davis*, [1891] 3 Ch. 119; *Re Barker*, [1892] 2 Ch. 491 (*semble*).

And although where a legacy is given to an infant the executor or administrator is a "trustee" in the broad sense in which that term is used in the Conveyancing Act, 1881 (44 & 45 Vict. c. 41) sec. 43 (*Re Smith*, 42 Ch. D. 302; *Re Adams*, [1906] W. N. 220; *cf. Hewston v. Phillips*, 11 Exch. 699), yet he is not held to be a trustee when the Statute of Limitations is in question. *Re Mackay*, [1906] 1 Ch. 25.

Similarly the next of kin may be barred of their claims against the executor, even though by statute an executor is declared to be a trustee for the next of kin as to any personalty not disposed of by the testator. *Re Lacy*, [1899] 2 Ch. 149. In *Dacre v. Patrickson*, 1 Dr. & Sm. 182, 185, *Kindersley, V. C.*, says: "Strictly speaking, a trustee cannot have a duty imposed upon him *virtute officii* as executor. If a trust is imposed upon him, it is in another character, namely, that of trustee, whose duty it is to carry out the trust. *Qua* executor, he cannot have a trust imposed upon him by the will. The only trust of which he is capable as executor is the trust created by the law for the next of kin." See *Maitland, Equity*, 48.

¹ Only a part of the opinion is given.

himself declaring in express terms that the personal estate should be subject to the payment of his debts. The contention is that this reasoning is now applicable to real estate by virtue of the Land Transfer Act, 1897, s. 2, sub-s. 3, and that the trust for payment of debts contained in the will is nugatory and futile. I am of opinion that this contention is not well founded.

The Land Transfer Act, 1897, s. 2, sub-s. 3, contains the following proviso: "provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies."

If real estate be expressly devised in trust to pay debts, that real estate forms the assets next applicable, after the general personal estate is exhausted: *Powis v. Corbet* (1747), 3 Atk. 556; *Phillips v. Parry* (1856), 22 Beav. 279.

Again, if real estate be charged with debts, the effect of the charge is to render the land charged applicable as assets next after real estate descended to the heir, and in priority to all real estate comprised in a specific or residuary devise, and not charged with debts. It is quite inaccurate to say that such a trust or charge as before mentioned is nugatory.¹

In the recent case of *In re Kempster*, [1906] 1 Ch. 446, 449, Kekewich J. pointed out that since the Land Transfer Act an express charge of debts is not futile, and that it is erroneous to say that no effect will be given to it. Although an executor is now entitled by law in every case to resort to the real estate for payment of debts, and is bound so to do if the circumstances require it, yet effect must still be given to a trust of land to pay debts, or a charge of debts upon land; the debts thereby become "charged upon or payable out of any land" within the meaning of s. 8 of the Real Property Limitation Act, 1874, and the period for their recovery is twelve years after a present right to receive the same shall have accrued. None of the statutes which by slow and hesitating steps have made land available for the debts of a deceased person have purported to interfere with any testamentary dispositions providing either by way of trust or charge for the payment of debts.² . . .

¹ See Warren, *Cas. Wills*, chap. 10, secs. 4, 6.

² See *Templeton v. Tompkins*, 45 Miss. 424. But see *Carrington v. Manning's Heirs*, 13 Ala. 611; *Steele v. Steele*, 64 Ala. 438, 458; *Starke v. Wilson*, 65 Ala. 576; *Martin v. Gage*, 9 N. Y. 393; *Trinity Church v. Watson*, 50 Pa. 518 (explaining *Alexander v. M'Murry*, 8 Watts (Pa.) 504).

KANSAS PACIFIC RAILWAY CO. v. CUTTER,
ADM'X, ETC.

SUPREME COURT, KANSAS. 1876.

16 Kan. 568.

ACTION by Mrs. Cutter as administratrix, to recover damages sustained by the next of kin of one Joseph Stewart, deceased. The petition alleged the death of said Stewart by the wrongful acts, negligence and mismanagement of the Railway Company while he was a passenger in the cars of said company between Manhattan and Ogden, in Riley county, in this state, in August 1872. It named the heirs and next of kin of said Stewart, and alleged that in September 1872, "letters of administration upon the estate of the said Joseph Stewart were duly issued by the probate court of Arrapahoe county, Territory of Colorado, to Lydia H. Harvey, who since the issuance of said letters of administration, has intermarried with Benjamin P. Cutter, by which the said Lydia H. Harvey, (now Lydia H. Cutter,) was appointed administratrix of all the goods and credits belonging to the said Joseph Stewart at the time of his death, and that she thereupon qualified and entered upon the duties of said administration." The Railway Company demurred, assigning the following grounds: "1st, The plaintiff has no capacity to sue, not having been appointed administratrix of the estate of Joseph Stewart within the state of Kansas; 2d, There is a defect of parties plaintiff, inasmuch as Benjamin P. Cutter, husband of the plaintiff in the petition mentioned, is not joined as plaintiff in the action; 3d, The petition does not state facts sufficient to constitute a cause of action."¹ The district court, at the September Term 1874, overruled the demurrer, and the Railway Company brings the case here on error.

BREWER, J. The first question in this case is, whether a foreign administrator can maintain an action under § 422 of the code of civil procedure. We think he can. The section provides that, "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter,

¹ The part of the opinion in which the last two grounds of objection were overruled is omitted.

if the former might have maintained an action had he lived, against the latter for an injury, for the same act or omission." Now the language is general, purports to give the cause of action in every such case happening within this state, whether the deceased be a resident or nonresident, whether death ensues here, or elsewhere. All that it nominates as the condition of a right of recovery is, the wrongful act, and the resulting death. Nor do the proceeds of the recovery become assets in the hand of the administrator for payment of the debts of the intestate. They are appropriated by the same section which gives the right of action, to the "exclusive benefit of the widow and children, if any, or next of kin," and the recovery by a foreign administrator does not at all conflict with those provisions of our law which attempt to secure the appropriation of the property of the decedent within this state to the payment of his debts due here, in preference to those due elsewhere. It, so to speak, creates a fund for the exclusive use of certain relatives of the deceased, and names the personal representatives as the trustees of that fund, and authorizes suit in their names. Any one else might have been named as the proper party plaintiff. Authority might have been given to the widow, and for the benefit of herself and children. This question has been before the supreme court of Indiana in the case of *J. M. & I. Rld. Co. v. Hendricks*, 41 Ind. 49, and the right of action sustained. This is the only authority counsel have cited that is apparently exactly in point, and to that we refer for a fuller discussion of the question. There is a slight difference between the section of the Indiana statute and ours concerning the right of foreign administrators to sue, but we do not think it affects the question materially. See also, *Hartford Rld. Co. v. Andrews*, 36 Conn. 213. . . .

*The judgment will be affirmed.*¹

¹ *Wilson v. Tootle*, 55 Fed. 211; *Wooden v. Western etc. R. R. Co.*, 126 N. Y. 10; *Boulden v. Pa. R. R. Co.*, 205 Pa. 264, *accord*. But it has been held that where a resident of a state is killed in that state and no domiciliary administrator appointed, an ancillary administrator cannot sue there for his death. *Metrakos v. Railroad Co.*, 91 Kan. 342. See also *Battese v. Railroad Co.*, 102 Kan. 468, criticized 31 Harv. L. Rev. 1161.

Money paid on a policy of insurance payable to the administrator of A in trust for A's widow is not a part of the assets of the deceased. *Cincinnati etc. R. R. Co. v. Thiebaud*, 114 Fed. 918; *Nickals v. Stanley*, 146 Cal. 724.

SHEFFIELD *v.* PARKER.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1893.

158 Mass. 330.

TWO APPEALS, the first by the children, and the second by the executors of the will, of Joel Parker, from a decree of the Probate Court, dated September 9, 1890, upon the first account of the executors. The cases were heard together by Holmes, J., and, at the request of the executors, reported by him for the consideration of the full court. The facts material to the points decided appear in the opinion.

KNOWLTON, J. This case comes before us on a report containing findings of fact of a single justice, and the evidence taken at the hearing. So far as the decision depends on the findings of fact, the conclusions of the single justice must be sustained, unless they are clearly erroneous. *Francis v. Daley*, 150 Mass. 381.

The most important question involved is whether the executors can be allowed in their account for an investment of \$10,000 in the stock of the Equitable Trust Company, which they made in their names as executors. They were authorized and directed to set apart the sum of \$12,000 from the general estate of the testator, and invest it for the benefit of his son, Edmund M. Parker, during his life, the fund to be paid over at his death to his lineal descendants, or, if he should leave no descendants, to the trustees of Dartmouth College. They were also authorized, under certain contingencies, to sell the testator's homestead, and invest and hold the proceeds as a trust fund. This sale, however, has not been made. The executors contend that their investment in the stock referred to was made for Edmund M. Parker, and that the stock has been held by them ever since as a part of the trust fund of \$12,000 which it was their duty to create. The evidence produced failed to prove, to the satisfaction of the judge who heard it, that at the time of the purchase the stock was appropriated to this trust "in such a sense as to give Edmund M. Parker the right at and from that moment to have it accounted for as his, or to prevent them from making a different disposition of it thereafter, if for any reason they should be so minded." There is no evidence to show the subsequent appropriation of it to this trust, until after it had so far depreciated in value as to deprive them of the right so to

appropriate it. It was conceded that they had no right to make such an investment for the general purposes of the estate, and the justice therefore found that the decree of the Probate Court was correct in disallowing this item in their account. The issue is narrowed to the simple question whether the judge should have found an appropriation to this trust by the executors when they took the stock.

It was held in *Miller v. Congdon*, 14 Gray, 114, and in *Collins v. Collins*, 140 Mass. 502, 506, 507, that, when a trust fund is to be created by an executor out of the assets of an estate, something more must be done by the executor in order to impress the trust on particular property than to hold the property with an intention that it shall constitute the trust fund. There must be some act of appropriation which transfers it to the trust fund and gives the beneficiaries the right to have it held for them. Doubtless the purchase of property by itself expressly to be held under the trust would be a sufficient act of appropriation; and there was evidence in this case from which a finding might have been made in favor of the executors. On the other hand, there was evidence which, without any imputation on the honesty or good faith of the executors, well warranted the finding that they had failed to sustain the burden of proving an appropriation of the stock to this trust. In the first place, the letter of February 27, 1878, from H. R. Bond, secretary, to the executors, which mentions the issuing of a certificate, refers to the subscription as made by "the estate of Joel Parker"; the certificate under which they held the stock was in the name of "Horatio G. Parker and Francis J. Parker, executors of will of Joel Parker," with no reference to the trust; the evidence tends to show that not until January, 1890, nearly twelve years after the stock was subscribed for, did either of the executors inform Edmund M. Parker, or any one else, that the stock was held as part of the trust fund; a statement of account made by one of the executors in 1882 treated the legacy of \$12,000 which was to constitute the trust fund as a liability against the estate, and included the stock subscribed for among the assets of the estate, and put upon it the valuation of \$60 per share; until the making of the probate account there was never anything on the books of the executors, either in their accounts with Edmund M. Parker or elsewhere, to identify the investment as made on account of the trust fund, and there was evidence of a conversation in which one of the executors offered to con-

vey to Edmund M. Parker and his sister, Mrs. Sheffield, the other legatee, interested in the general assets disposed of under the second clause of the will, other stock which belonged to the executors to make good the loss from this investment. We cannot say that the court was wrong in finding against the executors on the question whether the stock subscribed for was appropriated by them to the trust for the benefit of Edmund M. Parker and his descendants. For the purposes of the discussion, we have assumed without deciding that, if they had so appropriated it, the investment would have been one which they had a right to make.¹ . . .

¹ It is not always easy to determine whether, in a given case, an executor has ceased to hold a fund as executor, and assumed the attitude of a trustee. But the legal difference between the two relations is clearly defined and has been frequently illustrated. E.g. if the executor has become a trustee:

(1) The beneficiary has no claim on the general assets of the deceased. He must look solely to the specific *res* appropriated to the trust. *Willmott v. Jenkins*, 1 Beav. 401 (*semble*); *Brougham v. Poulett*, 19 Beav. 119; *Brown v. Kelsey*, 2 Cush. (Mass.) 243, 248; *Hubbard v. Lloyd*, 6 Cush. (Mass.) 522; *Miller v. Congdon*, 14 Gray (Mass.) 114 (*semble*); *Smith v. Everett*, 50 Miss. 575 (*semble*); *Hayes v. Hayes*, 48 N. H. 219. [If shares of national bank stock are transferred by executors to themselves as trustees, the general assets of the deceased are not liable for a subsequent assessment on the stock. *Williams v. Cobb*, 242 U. S. 307.]

(2) The beneficiary's remedy is in equity, instead of the Probate Court. *Parsons v. Lyman*, 32 Conn. 566, 5 Blatchf. 170; *Wylie v. Bushnell*, 277 Ill. 484; *Greene v. Brown*, 180 Mass. 308 (equity has no jurisdiction of accounting of executor); *Wooden v. Kerr*, 91 Mich. 188; *Smith v. Everett*, 50 Miss. 575; *Hayes v. Hayes*, 48 N. H. 219; *Leddel v. Starr*, 19 N. J. Eq. 159 (equity cannot remove an executor but may remove a trustee); *Bentley v. Dixon*, 60 N. J. Eq. 353 (like preceding case); *O'Callaghan's Appeal*, 64 N. J. Eq. 287; *Poole v. Brown*, 12 S. C. 556. [But when a debt of the deceased has several years to run, the creditor may in equity compel the executor to set aside a part of the assets of the estate to meet the debt on its maturity. *Bankers Surety Co. v. Meyer*, 205 N. Y. 219.]

(3) The beneficiary has a claim, in case of failure to invest, of what might have been realized. *Burchall v. Bradford*, 6 Madd. 235 (*semble*).

(4) If there are several executors and trustees, one trustee cannot act for all, where one executor might so act. *Astbury v. Astbury*, [1898] 2 Ch. 111 (waiver of Statute of Limitations by one trustee); *Attenborough v. Solomon*, [1913] A. C. 76 (pledge by one trustee); *Ham v. Ham*, 58 N. H. 70.

(5) One trustee may be liable for the default of a co-trustee when an executor would not have to answer for the default of a co-executor. *Dix v. Burford*, 19 Beav. 409.

(6) The beneficiary, as plaintiff, may be a witness in a proceeding against the trustee, when he could not testify in a proceeding against the executor as the representative of the deceased. *Myers v. Reinstein*, 67 Cal. 89.

(7) The beneficiary, as in other cases of trusts, may, to prevent a failure of

MATTER OF McALPINE.

COURT OF APPEALS, NEW YORK. 1891.

126 N. Y. 285.

CROSS-APPEALS from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made the first Tuesday of January, 1891, which modified, and affirmed as modified, a decree of the surrogate of the county of Monroe upon an accounting of the petitioners, as executors of the last will and testament of Henry S. Potter, deceased.

The opening clauses of the will of Henry S. Potter, are as follows:

the trust, secure the appointment of a new trustee. *Ex parte* Dover, 5 Sim. 500; *Ex parte* Wilkinson, 3 Mont. & A. 145.

(8) It seems clear that after the executor has become a trustee the sureties on the executor's bond cannot be charged for subsequent acts or omissions of the trustee: *Perkins v. Lewis*, 41 Ala. 649 (*semble*); *Hinds v. Hinds*, 85 Ind. 312; *State v. Anthony*, 30 Mo. Ap. 638; see also *Ruffin v. Harrison*, 81 N. C. 208; [40 L. R. A. (N.S.) 1136]. But in some jurisdictions, notably in Massachusetts, the sureties on the executor's bond continue liable, even though the regular executorial duties are all performed, until the executor has given a new bond as trustee: *Groton v. Ruggles*, 17 Me. 137 (*semble*); *Knight v. Loomis*, 30 Me. 204 (*semble*); *Hall v. Cushing*, 9 Pick. 395; *Ellis v. Ellis*, 12 Pick. 178, 181; *Towne v. Ammidown*, 20 Pick. 535; *Newcomb v. Williams*, 9 Met. 525; *Conkey v. Dickinson*, 13 Met. 51; *Prior v. Talbot*, 10 Cush. 1; *Miller v. Congdon*, 14 Gray 114; *Felton v. Sawyer*, 41 N. H. 202 (but see *Leavitt v. Wooster*, 14 N. H. 550); see also *State v. Nicola*, 10 Gill & J. 27; *Almond v. Mason*, 9 Grat. 700. And the court will permit a new bond to be given only when special reasons of convenience require it. The application of the executor to substitute a bond as trustee in place of his bond as executor was denied in *Dorr v. Wainwright*, 13 Pick. 328, and the beneficiary was equally unsuccessful in *Holbrook v. Harrington*, 16 Gray 102. In other jurisdictions where the will directed an investment of personalty by the executor, the sureties on the executor's bond were held until the investment was made. *Perkins v. Moore*, 16 Ala. 9; *Cranson v. Wilsey*, 71 Mich. 356; *Cluff v. Day*, 124 N. Y. 195; *Probate Court v. Angell*, 14 R. I. 495. — AMES.

(9) Creditors cannot reach the beneficiary's interest by trustee process, although a statute allows creditors thus to reach legacies due from executors. *Carson v. Carson*, 6 Allen (Mass.) 397. And in states in which a trust created by a third person cannot be reached by creditors of the beneficiary, a legacy may be reached by a creditor's bill. *Bacon v. Bonham*, 27 N. J. Eq. 209; *Hardenburgh v. Blair*, 30 N. J. Eq. 645. (By statute in New Jersey creditors can now reach part of the income from trusts. *Baumann v. Ballantine*, 76 N. J. L. 91.)

"I give, devise and bequeath to my trustees hereinafter named, excepted as otherwise provided, all my real and personal estate of which I shall die seized or possessed, in trust, nevertheless, for the uses and purposes, that is to say:

"I direct my executors and trustees hereinafter named, or those that shall be such at my decease, to retain my estate entire and undivided until and except as hereinafter directed.

"*First.* Pay my funeral expenses and my just debts and all taxes legally assessed on my estate, and all necessary repairs and reasonable insurance."

The will then directed the payment of an annuity of \$200 to a beneficiary named during her life, and the payment of one-sixth of the net annual income to each of six beneficiaries during his or her life, the annuities, however, to cease upon the death of the survivor of two persons named. Upon the decease of the surviving child of the testator, if all died before the survivor of said two persons named, or upon the death of such survivor, the executors were directed to close and distribute the estate as directed. Then followed this clause:

"*Twenty-first.* I do hereby give, devise and bequeath to my trustees hereinafter named, all and every part of my property and estate of whatever name, nature or description, and wheresoever situate, to have and to hold the same in trust for the uses and purposes in this my will expressed, with power to lease, sell, assign, transfer and convey the same, collect, invest and reinvest the proceeds thereof as they shall deem best for the interest of my estate, excepting only as otherwise herein provided."

FINCH, J. The principal question which is presented by this appeal is whether the commissions to be allowed are to be governed by the doctrine of *Johnson v. Lawrence*, 95 N. Y. 154, or *Laytin v. Davidson*, 95 id. 263. Both cases agree in the rule that double commissions to the same persons, first in the character of executors and then in that of trustees, are to be awarded only when the will contemplates a several and separable action in each capacity, not at the same but different stages of the administration, and that they are not to be allowed where the will makes no such separation, but blends the two duties and commingles them without a severance. To the ordinary duties of an executor may be added the performance of a trust in such a manner that the two functions run on together. It is the duty of an executor as such to pay to a legatee

the amount of the legacy in the manner and at the time provided by the testator, and it does not change that duty that the payment of the principal is postponed and the income made payable annually in the meantime. A trust duty may thus be imposed upon an executor which thereby becomes and is made a function of his office. A will must go further than that to admit of double commissions, and must clearly and definitely indicate an intention of the testator to end the executor's duty at some point of time, and require him thereupon to constitute and set up one or more several trusts, to be held and managed as such for the interest of the beneficiary. This will manifests no purpose of that character, for, while it creates a trust and speaks of the executors sometimes as trustees, there is no provision in it which requires or contemplates a holding of any part of the estate by trustees as distinguished from executors. At its very outset it makes the executors either wholly and continuously such, or wholly and continuously trustees, for in its first sentences it gives the entire estate in trust, and directs the "executors and trustees hereinafter named" to retain it undivided till the period of distribution, and meanwhile to pay funeral expenses, debts, accruing taxes, repairs, reasonable insurance, one fixed and definite annuity, and aliquot parts of the net accruing income until the final distribution. There is no provision requiring any share or trust fund to be severed from the body of the estate, or to be ascertained as a residue of principal to be kept invested for its specific income payable to a beneficiary, but all duties without separation, whether imposed by the law or by the will, run on together mingled and blended to the end. An examination of the cases in which double commissions have been allowed will show that they were exceptional in their nature and contained provisions distinctly and definitely pointing to a holding by trustees as such after the duties of the executors were completed and ended. This is not such a case, and double commissions were properly withheld.¹ . . .

¹ Double commissions were denied in *Matter of Zeigler*, 218 N. Y. 544. They were allowed in *Hurlburt v. Durant*, 88 N. Y. 121; *Matter of Willets*, 112 N. Y. 289.

See *Baker v. Johnston*, 39 N. J. Eq. 493, and *Pitney v. Everson*, 42 N. J. Eq. 361, rejecting the distinction made by the New York cases and holding that an executor who is also trustee is entitled to double commissions even though the testator has not clearly separated the different functions.

CHAPTER II.
THE CREATION OF A TRUST.

SECTION I.
The Intention to Create a Trust.

PALMER *v.* SCHRIBB.

CHANCERY. 1713.

2 Eq. Ca. Abr. 291, pl. 9.

J. S. devises the residue of his estate to his wife, and desires her to give all her estate at her death to his and her relations. *Quære*, If this does amount to a devise on a trust in the wife for all the estate which the husband gave her by his will. HARCOURT, C. thought these words too general to amount to a devise over of his estate after the death of the wife; nor can it be taken as a trust, because the words extend to all the estate which she shall be possessed of at the time of her death, which the husband has not any power over, and therefore it must be taken over as a recommendation, and not as a devise or trust. But if the testator had desired his wife by his will to give at her death all the estate which he had devised to her, to his and her relations, there the estate devised to her ought to go after her death to his and her relations, according to the statute of distributions.

*Bill dismissed.*¹

¹ Anon., 2 Eq. Ca. Abr. 291, pl. 8; *Eade v. Eade*, 5 Madd. 118; *Lechmere v. Lavie*, 2 M. & K. 197; *Hood v. Oglander*, 34 Beav. 513; *Parnall v. Parnall*, 9 Ch. D. 96; *Re Williams*, [1897] 2 Ch. 12; *Hopkins v. Glunt*, 111 Pa. 287, *accord*.

Although the testator cannot impose any trust upon other property than that bequeathed by him, yet he may attach to the bequest a condition that the legatee declare himself trustee of his own property or bequeath his own property to another. In *Re Williams*, *supra*, one judge found sufficient evidence of such an intent, but the majority of the court held that the testator did not intend to attach any condition to the bequest.

HARDING v. GLYN

CHANCERY. 1739.

1 Atk. 469.

NICHOLAS HARDING in 1701 made his will, and thereby gave "to Elizabeth, his wife, all his estate, leases, and interest in his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing-apparel, but did desire her at or before her death to give such leases, house, furniture, goods and chattels, plate and jewels, unto and amongst such of his own relations as she should think most deserving and approve of," and made his wife executrix, and died the 23d of January, 1736, without issue.

Elizabeth, his widow, made her will on the 12th of June, 1737, "and thereby gave all her estate, right, title, and interest to Henry Swindell in the house in Hatton Garden, which her husband had bequeathed to her in manner aforesaid; and after giving several legacies, bequeathed the residue of her personal estate to the defendant Glyn and two other persons, and made them executors," and soon after died, without having given at or before her death the goods in the said house, or without having disposed of any of her husband's jewels, to his relations.

The plaintiffs insisting that Elizabeth Harding had no property in the said furniture and jewels but for life, with a limited power of disposing of the same to her husband's relations, which she has not done, brought their bill in order that they might be distributed amongst his relations, according to the rule of distribution of intestates' effects.

MASTER OF THE ROLLS [VERNEY]. The first question is, If this is vested absolutely in the wife? And the second, If it is to be considered as undisposed of, after her death, who are entitled to it?

As to the first, it is clear the wife was intended to take only beneficially during her life; there are no technical words in a will, but the manifest intent of the testator is to take place, and the words "willing" or "desiring" have been frequently construed to amount to a trust, *Eacles et ux. v. England et ux.*, 2 Vern. 466; and the only doubt arises upon the persons who are to take after her.

Where the uncertainty is such that it is impossible for the court to determine what persons are meant, it is very strong for the court to construe it only as a recommendation to the first devisee, and make it absolute as to him; but here the word "relations" is a legal description, and this is a devise to such relations, and operates as a trust in the wife, by way of power of naming and apportioning, and her non-performance of the power shall not make the devise void, but the power shall devolve on the court; and though this is not to pass by virtue of the statute of distributions, yet that is a good rule for the court to go by. And therefore I think it ought to be divided among such of the relations of the testator Nicholas Harding, who were his next of kin at her death; and do order that so much of the said household goods in Hatton Garden, and other personal estate of the said testator Nicholas Harding, devised by his will to the said Elizabeth Harding, his wife, which she did not dispose of according to the power given her thereby, in case the same remains in specie, or the value thereof, be delivered to the next of kin of the said testator Nicholas Harding, to be divided equally amongst them, to take place from the time of the death of the said Elizabeth Harding.¹

HARLAND v. TRIGG.

CHANCERY. 1782.

1 Bro. C. C. 142.

RICHARD HARLAND, being seised in fee of the manor of Sutton, in the county of York, and having four sons, Philip, John, Richard (the plaintiff), and Francis, by his will in 1747 devised the said manor (with other lands) to Philip, the eldest son, for life, with remainder to his first and other sons in tail male, remainder to John, the second son, for life, remainder to the plaintiff for life, remainder to Richard for life, with like remainders to their several first and other sons, and with further remainders over. Richard, the father, died in 1750; Philip entered, and, being himself also possessed of leasehold estates in Sutton, some for lives and others for years, by his will, made in the year 1764, gave his leasehold estate for lives to the trustees

¹ See *Salisbury v. Denton*, 3 K. & J. 529, *post*, p. 358; 25 Harv. L. Rev. 26-28. For cases where the class is definite, *e. g.* the children of X, see *Ames*, 99-103; 25 Harv. L. Rev. 19-26.

of his father's will, to the same uses to which the lands devised by the father's will were limited, so far as by law he could; and then followed this clause: "And all other my leasehold estates in the parish or township of Sutton I give to my brother John Harland, forever, hoping he will continue them in the family." Philip died in 1766. John entered on the estate, and died in 1772, having made his will and given these leasehold estates to his widow, whom he made executrix, and who since married the defendant Trigg. Richard, the third son, filed this bill, insisting the devise in Philip's will subjected these estates to the same uses as those declared by the father's will; that he was, therefore, entitled to the next estate in remainder, and praying that it might be so declared.

Mr. Attorney General, Mr. Madocks, Mr. Ainge, and Mr. Spranger contended that John had an estate only for life. . . .

LORD CHANCELLOR [THURLOW]. I have no doubt but a requisition made with a clear object will amount to a trust. In the case of the Duchess of Buckingham's will, the words were very gentle, but had a distinct object. But where the words are not clear as to their object, they cannot raise a trust. Where this testator had a leasehold estate, which he meant should go to the family, he has used apt words; therefore, where he has not used such words, he had a different intent

Mr. Mansfield and Mr. Lloyd, for the defendant. . . .

LORD CHANCELLOR. I think every will ought to be construed according to the intent of the testator, where it can be collected. In order to make a title, the plaintiff states that the father had settled his estates in strict settlement, and insists that I shall understand this devise as giving the leasehold estates to the same uses, as nearly as their nature will admit. The testator gives other estates to trustees, subject to charges, to the uses in that settlement; he therefore understood how to make his estates liable to those uses, and intended something different here. The argument is, that there will be part of the will ineffectual, the words, "hoping that he will continue them in the family": the answer is, that the words are precatory, not imperative. Another argument made use of is, that, if this was furniture, the devise would carry it: but, if so, it would be on this ground, that he recollected that the house would pass and meant the furniture should remain attached to it under all its limitations. That case has peculiarities that do not occur here. It would be a great deal too much to tie this up as a strict settle-

ment. I had a doubt whether the family could not claim some interest in the subject, but when I come to consider, I take the rule of law to be this: that two things must concur to constitute these devises, — the terms and the object. Hoping is in contradistinction to a direct devise; but whenever there are annexed to such words precise and direct objects, the law has collected the whole together, and held the words sufficient to raise a trust; but then the objects must be distinct; where there is a choice, it must be in the power of the devisee to dispose of it either way. If he had sold these leaseholds, the family could not have taken them from the vendee, or if he had given them to any one part of the family, the others could have no remedy. The will does not import a devise, as the words do not clearly demonstrate an object. I am therefore of opinion that the bill must be dismissed.¹

STEAD *v.* MELLOR.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1877.

5 Ch. D. 225.

MOTION for judgment.

Ursula Crook, by her will, dated the 13th of May, 1872, appointed the plaintiffs her executors, and, after making divers specific and pecuniary bequests, gave all her personal estate, except what she otherwise bequeathed by that her will, to the plaintiffs, upon trust to convert the same into money, and, after payment of her funeral and testamentary expenses and debts, and the legacies other than specific given by her will, to hold the residue of the said moneys "in trust for such of my nieces, Martha Paulton and Ursula Mellor Taylor, as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes."

The testatrix died on the 16th of January, 1876, leaving Mrs. Paulton and Mrs. Taylor her surviving.

The action was brought by the plaintiffs, as executors of the will, to have the rights and interests of all persons in the residuary personal estate of the testatrix ascertained and declared; and the only question calling for a report was, whether Mrs. Paulton and Mrs. Taylor were entitled to the residue beneficially

¹ As to the meaning of "family," see 25 Harv. L. Rev. 26.

or as trustees; and if as trustees, then who were the persons beneficially entitled thereto.

JESSEL, M. R. I have often said that it is the duty of the court, in construing wills of personal estate, to look at the whole will, in order to ascertain the intention of the testator, not forgetting to apply general rules of construction, where such are applicable, but always giving to the language of the instrument its literal meaning, so far as the context allows.

I have been referred to the case of *Briggs v. Penny*, 3 MacN. & G. 546, as an authority for deciding that a trust is created. In that case, Lord Truro laid down what he considered to be the general principle. That is, of course, binding on me, although the decision itself would not necessarily be so, even if the words in the case before me were identically the same. *Gibson v. Fisher*, L. R. 5 Eq. 51.

Now, all that Lord Truro said with respect to the principles which he deduced from the then state of authority was this: "I conceive the rules of construction to be, that words accompanying a gift or bequest expressive of confidence or belief, or desire or hope, that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions: first, that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not; secondly, the subject must be certain; and, thirdly, the objects expressed must not be too vague or indefinite to be enforced."

Lower down, he says that there is no real and substantial distinction between the case of a testator who intends to make known, or has previously made known, his views and wishes to the legatee, and the case of a testator who gives all his property to A. on trust, but never declares that trust. To this I respectfully agree. But beyond these general principles, I find nothing in *Briggs v. Penny* to guide me to a conclusion in the present case. It was a decision on the particular words of a will. It has never been followed, as far as I know; at any rate, I am not aware of any case in which words so vague and so indefinite have been held to create a trust. The words were, "well knowing that she," the legatee, "will make a good use and dispose of it in a manner in accordance with my," the testatrix's, "views and wishes." Lord Truro appears to have been of opinion that the words "well knowing" were equivalent to, if not synonymous with, the expression "in the fullest confidence," and that they

were used in such a manner as to exclude all option or discretion. With all deference to his Lordship, that is a most unsatisfactory reason. Why should the words "well knowing" bear any other than their natural meaning? No reason is given why they should. However, that is the decision.

Whether the case of *Briggs v. Penny* was rightly or wrongly decided, (and I must not forget that it affirmed the decision of a very learned judge, the Vice-Chancellor Knight Bruce,) it is distinguishable from the present case, and as the words are not the same, and I am not bound to regard it as a binding authority on the construction of the particular will now before me, I am free to inquire what the testatrix did really mean; and unless I find in the will something equivalent to a declaration that the residuary legatees take as trustees, I must hold that they take a beneficial interest. The testatrix gives all her personal estate, except what she otherwise bequeathed by her will or any codicil thereto, to trustees upon trust to convert the same into money. It is clear that she knew how to create a trust. And then, after payment of her personal and testamentary expenses and debts and legacies, she directs her trustees to hold the residue of her money upon trust for her two nieces, her desire being that they shall distribute such residue, not "in accordance with my views and wishes," as in the case before Lord Truro, or "as they know will be most agreeable to my wishes," but "as they think will be most agreeable to my wishes." What is that but to make them judges of the mode of distribution, and place the residue at their absolute disposal?

But for the case of *Briggs v. Penny* this case would not have been arguable. There must be a declaration that Mrs. Paulton and Mrs. Taylor take the residue for their own benefit.¹

In re HUMPHREY'S ESTATE.

HIGH COURT OF JUSTICE, CHANCERY DIVISION,
IRELAND. 1915.

[1916] 1 I. R. 21.

MOTION.

John Edmund Longfield, of Kilcoleman, Enniskeane, Co. Cork, died on the 12th June, 1913, having made his will, dated the 1st March, 1912, in the following terms: — "I John Edmund

¹ See Ames, 93n.

Longfield, of Kilcoleman, Enniskeane, Co. Cork, do hereby make this my last will and testament. I revoke all former wills. All my property, real and personal of every kind, I leave to my wife, Elinor Mary Augusta, and I appoint her the sole executrix of this my last will and testament. I express the wish that she should leave by her will, or transfer during her life, as she shall think fit, my house and demesne of Kilcoleman to my son John Foster, with sufficient money for his and its maintenance, but not before he has reached the age of twenty-five years. The remainder of my property I wish to be left, or transferred, to my daughters, Elinor Frances Beatrice and Margaret Lilian, in such way as the said Elinor Mary Augusta shall see fit."

John Edmund Longfield died on the 12th June, 1913, and probate of his will was granted to his executrix, Elinor Mary Augusta Longfield.

The testator left issue, one son and three daughters, viz., John Foster Longfield, Elinor Frances Beatrice Longfield, and Margaret Lilian Longfield, who were living at the date of the execution of his will, and Frances Emily Lydia Longfield, who was born after the date of the will.

The property left by the testator included a fee-farm rent of £37 8s. 9d. *per annum*, payable out of the lands of East Ballyspillane, sold in the present matter, which rent was redeemed for the sum of £900. When the matter came before the examiner, he required that the questions arising out of the testator's will should be judicially determined. Accordingly, the present application was made to the Court by Mrs. Elinor Mary Augusta Longfield, asking for a declaration that, upon the true construction of the will, she was absolutely entitled to all assets, real and personal, of the said testator.

Ross, J. [His lordship having stated the facts and read the will, proceeded as follows:—]

The earlier words in the will confer an absolute interest on the wife. The question is whether the later clauses cut down this interest to an estate for life. In the latter event the daughter who was born after the date of the will is altogether excluded from participation. To the ordinary man of intelligence, uninstructed in the doctrine of what are called precatory trusts, it would, no doubt, cause astonishment that there could be any doubt about the true meaning of this will.

The testator in clear words gives all his property to his wife, and appoints her executrix. He then expresses a wish that she

should dispose of it for the benefit of his children in a certain way. I am sure the testator himself would have been amazed if the mere expression of his wish for the guidance of his wife should have the effect of creating a legal obligation of the strictest character, tying up all the property and preventing her from providing for any children that might be born after the making of the will. After a devise and bequest in clear and explicit terms, if a trust is intended to be created one would expect that this would be done in terms equally clear and explicit. When we come to consider the innumerable decisions in which the Courts of equity have displayed their benevolent astuteness in imposing an obligatory meaning upon words merely expressive of desire, the mind is reduced to a condition of perplexity and confusion. Trusts have been held to be created by the following expressions: — "I desire him to give," "I advise him to settle," "It is my dying request," "It is my will and desire," "I recommend," "Well knowing," and such like. All these one would think impose at most a moral obligation. On the other hand, an expression of hope that the devisee would continue the estate in the family has been held to create no trust. I think it is quite impossible to reconcile the cases. However that may be, there is no doubt that the tide has turned and is running strong against precatory trusts.

In *Lambe v. Eames*, L. R. 6 Ch. 597, at p. 599, Lord Justice James said: — "In hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery, in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed." These words are approved of by Lopes L. J. in *Hill v. Hill*, [1897] 1 Q. B. 483, at p. 488, who further says: "It is inconceivable to me that a testator who really meant his hope, recommendation, confidence, or request to be imperative should not express his intention in a mandatory form. I agree with Mr. Farwell in his book on Powers, when he says at p. 480, 'It would not be a very strained inference to regard all such expressions as stating the motive that induced the absolute gift rather than as a fetter imposed upon it.'" He adds, "It is in every case a question of intention, and the whole document with the surrounding circumstances must be considered."

Lord Lindley says in *In re Hamilton*, [1895] 2 Ch. 370, at p. 373: — "You must take the will which you have to construe and see what it means, and if you come to the conclusion that

no trust was intended, you say so, although previous judges have said the contrary on some wills more or less similar to the one which you have to construe."

Lord St. Leonards, in his work on the Law of Property, published in 1849, wrote as follows (p. 375): — "The law as to the operation of words of recommendation, confidence, request, or the like, attached to an absolute gift, has in late times varied from the earlier authorities. In nearly every recent case the gift has been held to be uncontrolled by the request or recommendation made or confidence expressed. This undoubtedly simplifies the law, and it is not an unwholesome rule that, if a testator really mean his recommendation to be imperative, he should express his intention in a mandatory form; but this conclusion was not arrived at without a considerable struggle." . . .

In *In re Diggles*, 39 Ch. D. 253, the Court held that in considering whether on the whole will the testator's intention was to create a trust, regard may be had to any embarrassment and difficulty which would arise from a trust. Applying this to the case before me, surely the possibility that children might be born to the testator after making his will, for whom his wife could not provide, is such an embarrassment and difficulty.

In *Wright v. Atkyns*, Turn. & R. 143, which was much relied on in the contention in favour of a trust, it was laid down (at p. 157) that three things are required to create such a trust: — (1) the words must be imperative; (2) the subject must be certain; (3) the object must be certain. Assuming certainty in the subject and object indicated in this will, am I obliged to hold the words used imperative? I think not.

The outcome of the cases is simply this, that the words are to be interpreted in their ordinary sense, unless there is something in the terms of the will operating upon the property disposed of, from which a Court ought to infer that a trust is intended or a condition imposed. In this will there is not a trust, in language, from the beginning to the end of it, or anything in the will from which a trust can be legitimately inferred.

I therefore hold that Elinor Mary Augusta Longfield took the property absolutely uncontrolled by any legal obligation, and I make a declaration accordingly in respect of the £900 now in Court.¹

¹ See the following recent cases exemplifying the modern rule: — *Re Williams*, [1897] 2 Ch. 12; *Hill v. Hill*, [1897] 1 Q. B. 483; *Comiskey v. Bowring-Hanbury*, [1905] A. C. 84; *Re Conolly*, [1910] 1 Ch. 219; *Re Atkinson*, 80

In re WEEKES' SETTLEMENT.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1897.

[1897] 1 Ch. 289.

SUMMONS for payment out of court of a sum of Consols standing to the credit of ex parte the London, Brighton and South Coast Railway Company, the account of the persons interested in Brookside Farm under the settlement referred to in the summons.

By a settlement dated April 27, 1857, made on the marriage of Emily Mary Weekes with James Slade, certain real property to which Emily Mary Weekes was entitled, which included the remainder in fee of Brookside Farm expectant on the death of her mother, was settled to uses in favour of the intended wife for life, and upon her death as she should, whether covert or sole, by will appoint, and in default of appointment to the use of the person or persons who at the decease of E. M. Weekes would have been entitled thereto by descent in case she had died seised thereof by purchase intestate and a widow.

By a settlement of even date certain personal property therein described was settled in favour of James Slade and his wife during their lives and the life of the survivor, and after the decease of the survivor in trust for the issue of the marriage as the husband and wife should by deed jointly appoint, and in default as the survivor should by deed or will appoint, and in default of appointment for all the children who being a son or sons should attain twenty-one, or being a daughter or daughters should attain that age or marry, and if more than one in equal shares.

Pursuant to the powers given to them by their Acts the London, Brighton and South Coast Railway Company took

L. J. Ch. 370; *Est. of Browne*, 175 Cal. 361; *Aldrich v. Aldrich*, 172 Mass. 101; *McCurdy v. McCallum*, 186 Mass. 464; *Lemp v. Lemp*, 264 Mo. 533; *Clay v. Wood*, 153 N. Y. 134; *Carter v. Strickland*, 165 N. C. 69. See a collection of authorities in 37 L. R. A. (n.s.) 646; *Ann. Cas.* 1915D 418.

In the following cases it was thought that the testator intended to create a trust or charge:—*Re Burley*, [1910] 1 Ch. 215; *M'Cabe v. Campbell*, [1918] 1 I. R. 429; *Moseley v. Bolster*, 201 Mass. 135; *Phillips v. Phillips*, 112 N. Y. 197; *Turrill v. Davenport*, 173 N. Y. App. Div. 543; *Re Dewey's Est.*, 45 Utah 98.

In New Jersey the courts still seem to cling to the older view. *Deacon v. Cobson*, 83 N. J. Eq. 122.

certain parts of the Brookside Farm and paid the purchase-money into Court, and the Consols in court represented such purchase-money.

Emily Mary Slade died in May, 1885, having made her will, dated April 15, 1885, which so far as is material was in the following words: "I bequeath to my husband James Slade a life interest in all property real or personal which may come to me in accordance with the will of my late father Richard Weekes and also in the house which I took under the will of my late cousin George Weekes and I give to him power to dispose of all such property by will amongst our children in accordance with the power granted to him as regards the other property which I have under my marriage settlements. I also bequeath unto him the said James Slade all my effects clothes jewellery and other articles to be at his entire will and disposal." The will contained no gift over in default of appointment.

James Slade died in February, 1893, intestate and without having exercised the power of disposition given him by the will of his wife, Emily Mary Slade.

There were fourteen children of the marriage, eight of whom survived their mother and were living.

The tenant for life having recently died, this was an application for payment out of the Consols in court in eighths on the ground that the will of Emily Mary Slade gave to James Slade a life interest in the Brookside Farm with a power to appoint among the children of the marriage, and that this power not having been exercised the children were entitled equally. The respondent, the eldest son, claimed the Consols as heir-at-law of Emily Mary Weekes.

ROMER, J. By the settlement of April 27, 1857, the property now represented by the Consols in court was settled on Emily Mary Slade for life with remainder as she should by will appoint, and with a gift over in default of appointment.

By her will, dated April 15, 1885, Mrs. Slade bequeathed the property in the following terms: [His Lordship read the will as above set out.]

The husband did not exercise the power of appointment, and the question is whether the children take in default of appointment.

Now, apart from the authorities, I should gather from the terms of the will that it was a mere power that was conferred on the husband, and not one coupled with a trust that he was

bound to exercise. I see no words in the will to justify me in holding that the testatrix intended that the children should take if her husband did not execute the power.

This is not a case of a gift to the children with power to the husband to select, or to such of the children as the husband should select by exercising the power.

If in this case the testatrix really intended to give a life interest to her husband and a mere power to appoint if he chose, and intended if he did not think fit to appoint that the property should go as in default of appointment according to the settlement, why should she be bound to say more than she has said in this will?

I come to the conclusion on the words of this will that the testatrix only intended to give a life interest and a power to her husband — certainly she has not said more than that.

Am I then bound by the authorities to hold otherwise? I think I am not. The authorities do not shew, in my opinion, that there is a hard and fast rule that a gift to A for life with a power to A to appoint among a class and nothing more must, if there is no gift over in the will, be held a gift by implication to the class in default of the power being exercised. In my opinion the cases shew (though there may be found here and there certain remarks of a few learned judges which, if not interpreted by the facts of the particular case before them, might seem to have a more extended operation) that you must find in the will an indication that the testatrix did intend the class or some of the class to take — intended in fact that the power should be regarded in the nature of a trust — only a power of selection being given, as, for example, a gift to A for life with a gift over to such of a class as A shall appoint.

I will now examine the authorities which have been cited, and shew that this is so, though I may remark that the case before me is peculiar in this, that there is a gift over in default of appointment by the husband by force of the settlement, so that this will need not in any case come within the general proposition above stated.¹ . . .

¹ The court proceeded to consider the following cases: *Healy v. Donnery*, 3 Ir. C. L. Rep. 213; *Brown v. Higgs*, 4 Ves. 708, 5 Ves. 495, 8 Ves. 561; *Burrough v. Philcox*, 5 My. & Cr. 73; *Witts v. Boddington*, 3 Bro. C. C. 95; *Forbes v. Ball*, 3 Mer. 437; *Birch v. Wade*, 3 V. & B. 198; *Re Caplin's Will*, 2 Dr. & Sm. 527; *Re White's Trusts*, John. 656; *Butler v. Gray*, L. R. 5 Ch. 26; *Re Brierley*, 43 W. R. 36.

I have now shewn that none of the cases relied on by the applicants establish the general proposition; and I hold that in this case there was no gift by implication to the children of Emily Mary Slade in default of appointment by her husband.¹

FOSTER v. ELSLEY.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1881.

19 Ch. D. 518.

GEORGE MAY UPFIELD, by his will, dated the 31st of October, 1879, after appointing the defendants his executors and trustees, devised and bequeathed to them all his real and personal estate upon the trusts therein set forth, and the will contained the following clause: "And I declare that my solicitor, William Edward Foster" (the plaintiff), "shall be the solicitor to my estate and to my said trustees in the management and carrying out the provisions of this my will."

The testator died on the 3d of November, 1879, and his will was subsequently proved by the defendants, who, in pursuance of the directions contained in the will, employed the plaintiff as their solicitor in the management of the trust estate up to the 13th of October, 1881, when he received a letter from certain solicitors at Oldham stating that they were instructed by the defendants to ask for the immediate delivery of all deeds, documents, and securities in his possession, relating to the estate of the testator, and also an account of costs due to the plaintiff, and also for an appointment for them to attend at the plaintiffs office and pay such costs, and receive the documents.

This was a motion by the plaintiff to restrain the defendants from employing any person other than the plaintiff as solicitor to the estate of the testator, or in any business relating to the management or carrying out of the provisions of his will.

Dundas Gardiner, in support of the motion. The testator has thought fit to appoint Mr. Foster solicitor to his estate and to his trustees, and they cannot, I submit, arbitrarily remove

¹ See *Re Hall*, [1899] 1 I. R. 308, in which it was held that when the power was not exercised the objects of the power were not entitled. To the opposite effect see *Loosing v. Loosing*, 85 Neb. 66; *Dominick v. Sayre*, 3 Sandf. (N. Y.) 555. And see *Ahearne v. Aherne*, 9 L. R. Ir. 144. See Gray, *Powers in Trust and Gifts Implied in Default of Appointment*, 25 Harv. L. Rev. 1; *Kales*, Cas. Fut. Int., 719-764.

him from the office, nothing being charged against him in the discharge of his duties. I rely upon *Williams v. Corbet*, 8 Sim. 349, and *Hibbert v. Hibbert*, 3 Mer. 681.

Ince, Q. C., and *Hamilton Humphreys*, for the defendants, were not called upon, but referred to *Shaw v. Lawless*, 5 Cl. & F. 129, and *Finden v. Stephens*, 2 Ph. 142.

CHITTY, J. The testator in this case has inserted a clause in his will that "my solicitor, W. E. Foster, shall be the solicitor to my estate and to my said trustees in the management and carrying out the provisions of this my will," and this motion is founded on the proposition that this clause imposes on his trustees the duty of employing this gentleman (the plaintiff) as their solicitor. In *Finden v. Stephens*, to which I have been referred, the direction was that a certain person should be employed as agent and manager of the testator's estates whenever his trustees should have occasion for the services of a person in that capacity, and it was held that the direction did not create a trust which such person could enforce. The case of *Shaw v. Lawless*, in the House of Lords, had previously decided the question. I am told that no case is to be found in the books like the one before me where a testator has appointed a particular person as solicitor to his estate, but in analogy to the cases to which I have referred I decide that the direction in this will imposes no trust or duty on the trustees to continue the plaintiff as their solicitor, and that being my decision I refuse this motion with costs.¹

¹ *Shaw v. Lawless*, 5 Cl. & F. 129 (agent to collect rents); *Finden v. Stephens*, 2 Phil. 142 (manager of estate); *Re Ogier*, 101 Cal. 381 (attorney); *Jewell v. Barnes' Adm'r*, 110 Ky. 329 (business employee); *Matter of Caldwell*, 188 N. Y. 115, 120 (attorney); *Re Wallach*, 164 N. Y. App. Div. 600 (attorney); *Re Thistlethwaite*, 104 N. Y. Supp. 264 (attorney); *Re Pickett's Will*, 49 Ore. 127 (attorney); *Young v. Alexander*, 84 Tenn. 108 (attorney), *accord.* *Williams v. Corbet*, 8 Sim. 349 (auditor of accounts); *Hibbert v. Hibbert*, 3 Meriv. 681 (receiver of property); *Consett v. Bell*, 1 Y. & C. Ch. 569 (receiver of property), *contra.* See 65 U. of Pa. L. Rev. 651.

SECTION II.

Consideration.

DOCTOR AND STUDENT (1523).

DIALOGUE II, CHAPTER 22.

Doctor. May not a use be assigned to a stranger, as well as to be reserved to the feoffor, if the feoffor so appointed it upon his feoffment?

Student. Yes, as well, and in like wise to the feoffee, and that upon a free gift, without any bargain or recompence, if the feoffor so will.¹

Doct. What if no feoffment be made, but that a man grant to his feoffee, that from henceforth he shall stand seised to his own use? Is not that use changed, though there be no recompence?

Stud. I think yes, for there was an use *in esse* before the gift, which he might as lawfully give away, as he might the land if he had it in possession.²

Doct. And what if a man being seised of land in fee, grant to another of his mere motion without bargain or recompence, that he from thenceforth shall be seised to the use of the other; is not that grant good?

Stud. I suppose that it is not good; for, as I take the law, a man cannot commence an use but by livery of seisin, or upon a bargain, as [or?] some other recompence.³

¹ "When the estate was by legal conveyance transferred to a person to uses, equity made no scruple in enforcing the trustee to observe the uses. The estate being actually divested out of the owner, it was not necessary to exercise the power of the court over him, and as the feoffee, &c. was a mere trustee, he was considered bound under all circumstances to observe the will of his donor, although the uses were unsupported by any consideration. Therefore a feoffment to A to the use of B, a mere friend of the feoffor's, who paid no consideration whatever for the estate, was binding, and A was compellable to permit B to receive the profits." Gilbert, *Uses*, Introd. xlv.

² "I say there is no doubt but that if I sell you my use, the use is changed from my person to you: so I understand that if I say to you, 'I give you my use in certain lands,' you have the use by such words; for the use does not pass as the land does; for land cannot pass except by livery, but a use passes by bare words." — *Per York*, Y. B. 27 H. VIII. fol. 8, pl. 22.

³ "*Cestui que use* may grant his use without consideration, as he may his horse or other chattell; but he cannot raise a use without good consideration. And this consideration must be some cause or occasion meritorious, amounting to a mutuall recompence in deed or in law." Finch, *Law* (ed. 1636), 34.

ANONYMOUS.

———, 1545.

Bro. Abr., Feoff. al Uses, pl. 54, March's Transl., 95.

HALES, J. A man cannot change a use by a covenant which is executed before, as to covenant to be seised to the use of W. S. because that W. S. is his cosin; or because that W. S. before gave to him twenty pound, except the twenty pound was given to have the same land. But otherwise of a consideration, present or future, for the same purpose, as for one hundred pounds paid for the land *tempore conventionis*, or to bee paid at a future day, or for to marry his daughter, or the like.

NOWELL v. HUDSTON.

———, 1595.

2 Roll. Abr. Uses, 790, pl. 3.

IF ONE bargains and sells to J. S. to the use of J. S. and his heirs, without mention of any consideration, particular or general, and without such general words as by divers good considerations, still a consideration may be averred.

BARKER v. KEATE.

COMMON PLEAS. 1677.

2 Vent. 35.¹

IN AN ejectment upon a special verdict the sole point was, whether a lease for a year, upon no other consideration than reserving a pepper-corn, if it be demanded, shall work as a bargain and sale, and so to make the lessee capable of a release?

And it was resolved that it should, and that the reservation made a sufficient consideration to raise an use, as by bargain and sale. *Vide* 10 Co. in the case of Sutton's Hospital.

GILBERT, Uses, 98, 96. — If a man, in consideration of so much money, to be paid at a day to come, bargains and sells,

¹ 1 Freem. K. B. 249, 1 Mod. 262, 2 Mod. 249, s. c.

the use passes presently, and after the day the party has an action for the money; for 'tis a sale, be the money paid presently or hereafter.

If there be a consideration of money expressed in the deed, no averment or evidence can be admitted against it; for the affirmative is proved by the deed, and 'tis impossible in law or equity the negative should ever be proved.¹

SHARINGTON *v.* STROTTON.

QUEEN'S BENCH. 1565.

Plowd. 298.

TRESPASS quare clausum fregit. The defendants justified as servants of Edward and Agnes Baynton, whose title was founded upon an indenture between Edward and his brother Andrew Baynton, whereby Andrew, being seised of the close in question, by an indenture reciting his intent that the land might continue and remain to such of the blood and name of Baynton as in the indenture should be named, for the said cause, and for the good will, brotherly love, and favor which he bore to Edward his brother and his other brothers named, covenanted and granted that he and his heirs should stand seised thereof to the use of himself for life, and after his death to the use of Edward and Agnes his wife for their lives, with divers remainders over. Andrew died. Edward and Agnes claimed as legal tenants for life under the indenture and the Statute of Uses. The plaintiffs demurred upon the defendant's plea.

The case was argued at Michaelmas Term, 1565² . . .

And after these arguments the court took time to deliberate until Hilary Term, and from thence until Easter Term, and from thence until this present Trinity Term, in the eighth year of the reign of the present Queen, and the defendants now prayed judgment. And CORBET, Justice, said, that he and all his companions had resolved that judgment should be given against the plaintiffs. For it seemed to them that the considerations of the continuance of the land in the name and blood, and of

¹ See *Fisher v. Smith*, Moore 569; *Wilkes v. Leuson*, Dy. 169 a; *Jackson v. Alexander*, 3 Johns. (N. Y.) 484 ("for value received"); *Fuller v. Missroon*, 35 S.C. 314.

² This short statement of the case is taken from Ames, 109, and is substituted for the very lengthy statement in the report.

brotherly love, were sufficient to raise the uses limited. But, he said, as my Lord Chief Justice is not now present, you must move it again when he is present, and you shall have judgment. And afterwards, at another day, CATLINE, Chief Justice, being present; the apprentice prayed judgment. And CATLINE and the court were agreed that judgment should be entered against the plaintiffs, and he ordered Haywood, the Prothonotary, to enter it. And the apprentice said, May it please your lordship to shew us, for our learning, the causes of your judgment. And CATLINE said, It seems to us that the affection of the said Andrew for the provision of the heirs males which he should beget, and his desire that the land should continue in the blood and name of Baynton, and the brotherly love which he bore to his brothers, are sufficient considerations to raise the uses in the land. And where you said in your argument *Naturae vis maxima*, I say *Natura bis maxima*, and it is the greatest consideration that can be to raise a use. But as to the other consideration moved in the argument, viz. of the marriage had between Edward Baynton and Agnes, the record does not prove this, nor is it so averred, and it shall not be so intended, and therefore I don't regard it, but the other causes and considerations are effectual, and those which moved us to our judgment. . . .

BACON, READING ON THE STATUTE OF USES, 13, 14. — I would have one case shewed by men learned in the law where there is a deed and yet there needs a consideration. As for parole, the law adjudgeth it too light to give action without consideration; but a deed ever in law imports a consideration, because of the deliberation and ceremony in the confection of it; and therefore in 8 Reginae (*Sharington v. Strotton*, Plowd. 298, 309) it is solemnly argued that a deed should raise an use without any other consideration. . . . And yet they say that an use is but a nimble and light thing; and now contrariwise, it seemeth to be weightier than anything else; for you cannot weigh it up to raise it, neither by deed nor deed inrolled, without the weight of a consideration. But you shall never find a reason of this to the world's end in the law, but it is a reason of Chancery and it is this: that no court of conscience will enforce *donum gratuitum*, tho' the intent appear never so clearly, where it is not executed or sufficiently passed by law; but if money had been paid, and so a person damnified, or that it was for the

establishment of his house, then it is a good matter in the Chancery.

AMES, THE HISTORY OF ASSUMPSIT.¹—Not only was the consideration of the common-law action of assumpsit not borrowed from equity, but on the contrary, the consideration which gave validity to parol uses by bargain and agreement was borrowed from the common law. The bargain and sale of a use, as well as the agreement to stand seised, were not executory contracts but conveyances. No action at law could ever be brought against a bargainer or covenantor. *Sharington v. Strotton*, Plow. 298, 308; *Buckley v. Simonds*, Winch, 35–37, 59, 61; *Hore v. Dix*, 1 Sid. 25, 27; *Pybus v. Mitford*, 2 Lev. 75, 77. The absolute owner of land was conceived of as having in himself two distinct things, the seisin and the use. As he might make livery of seisin and retain the use, so he was permitted, at last, to grant away the use and keep the seisin. The grant of the use was furthermore assimilated to the grant of a chattel or money. A *quid pro quo*, or a deed, being essential to the transfer of a chattel or the grant of a debt, it was required also in the grant of a use. Equity might conceivably have enforced uses wherever the grant was by deed. But the chancellors declined to carry the innovation so far as this. They enforced only those gratuitous covenants which tended to “the establishment of the house” of the covenantor; in other words, covenants made in consideration of blood or marriage.

ANONYMOUS.

2 Roll. Abr. Uses, 784 (I), pl. 5, 6, 7.

IF a man in consideration that B. will marry his daughter covenants to stand seised to the use of B. and his daughter, remainder to C., this is a void remainder to C., for he is a stranger to the consideration.²

¹ 2 Harv. L. Rev. 18, 19; Ames, Lect. Leg. Hist., 148. See also 21 Harv. L. Rev. 266; Ames, Lect. Leg. Hist. 241.

² *Paget's Case*, 1 Rep. 154; *Moo*. 193, pl. 343; 1 Leon. 194, pl. 279, s. c.; *Wiseman's Case*, 2 Rep. 15; *Moo*. 195, pl. 344; *And*. 140, pl. 191, s. c.; *Fox v. Wilcocks*, 2 Roll. Abr. 733 (H.), pl. 4; *Smith v. Risley*, Cro. Car. 529; *Jones*, 418, pl. 6, s. c.; *Bulkley's Case*, Ley, 57, 58; *Whaley v. Tankard*, 2 Lev. 52, 54; *Nugent v. Hancock*, 22 Vin. Abr. Uses (H.), pl. 13, *accord*.

Cestui que use is a stranger, unless (1) nearly related by blood to the covenantor, e.g. a son or grandson (*Bonde v. Edmonds*, 2 Roll. Abr. 782, *Uses*

In consideration of certain money given by B. a man may covenant to stand seised to the use of A. for life, remainder to C. in fee; for here it is apparent that the money was given for both estates; and although A. and C. are strangers to the giving of the money, still they are sufficiently privy since it was given for them.

So, in consideration of certain moneys given by B., a man may covenant to stand seised to the use of B. for life, remainder to C. in fee, or with divers mesne remainders, for the money was given for all the estates. Cit. Plow. 307b.

PYE, }
DUBOST, } EX PARTE.

CHANCERY. 1811.

18 Ves. 140.

WILLIAM MOWBRAY, by his will dated the 10th of April, 1806, giving his wife the residue of his property after payment of his debts, except the sums after mentioned, among other legacies, gave as follows: "I give and bequeath the sum of 4,000*l.* sterling to Louisa Hortensia Garos, daughter of John Louis Garos, formerly of Berwick Street, Westminster; the like

(H.), pl. 3; 2 Roll. Abr. 785, Uses (K.), pl. 6, 8); a daughter (2 Roll. Abr. 784, Uses (I.), pl. 2); a brother (Sharington *v.* Strotton, *supra*); a nephew (Englefield's Case, 7 Rep. 11 b); and the like; or unless (2) connected by marriage with the covenantor, e.g. wife of covenantor (Bedell's Case, 7 Rep. 40; Burgoine *v.* Burgoine, 22 Vin. Abr. Uses (N.), pl. 10; Co. Lit. 112 a); husband of covenantor's daughter (2 Roll. Abr. 784, Uses (I), pl. 2); wife of covenantor's son (Anon., 13 Rep. 48; Sheffield's Case, 13 Rep. 49; Corbyn *v.* Corbyn, 2 Roll. Abr. 784 (I), pl. 4; Bould *v.* Winston, Cro. Jac. 168; Noy, 125, s. c.); wife of covenantor's brother (2 Roll. Abr. 783 (I), pl. 1); and the like. A covenant to stand seised to the use of a bastard child is not good. Frampton *v.* Gerrard, 2 Roll. Abr. 785, Uses (K.), pl. 4, 791, pl. 1; 22 Vin. Abr. 199, Uses (K.), pl. 4, Moo. 735; Gerrarde *v.* Worsley, Dy. 374, pl. 16, 1 And 79, pl. 145; Perrot's Case, 2 Roll. Abr. 785 (K.), pl. 5. Cf. Ivey *v.* Granberry, 66 N. C. 223.

The *cestui que use* need not be the covenantee. Bedell's Case, *supra*; Harpur's Case, 11 Rep. 24 b; Buckler *v.* Symons, 2 Roll. Abr. Uses 788; Winch, 61. In Co. Lit., *supra*, the learned commentator says: "A man may by his deed covenant with others to stand seised to the use of his wife. . . . But a man cannot covenant with his wife to stand seised to her use; because he cannot covenant with her, for the reason that Littleton here yieldeth (*viz.* that 'his wife and he are but one person in the law')." See to the same effect Gilb. Trusts, 52, 54. — AMES.

sum of 4,000*l.* to Emily Garos, her sister, and 4,000*l.* to Julia Garos, her other sister; and in case of the death of one of the three, I desire that the legacy may be divided equally betwixt the two surviving sisters; and in case of the death of two of them, I desire the whole 12,000*l.* may be paid to the surviving sister."

The testator also gave to John Louis Garos 600*l.*; and "to Marie Genevieve Garos, his wife, the sum of 2,500*l.* sterling for her own use, and over which her husband is not to have any power: he having lived abroad for many years, and she in this country, and no correspondence having passed between them during that time. Her own receipt shall be a sufficient authority to my executors for paying her the above legacy."

The testator died on the 8th of June, 1809. His widow became a lunatic; the petitioner, Pye, was the committee under the commission, and, upon her death, took out administration to her, and administration *de bonis non* to the testator.

The Master's report stated . . . that, by a letter written by the testator to Christopher Dubost, in Paris, on the 25th of November, 1807, the testator authorized him to purchase in France an annuity of 100*l.* for the benefit of the said Marie Genevieve Garos for her life, and to draw on him for 1,500*l.* on account of such purchase; and under that authority Dubost purchased an annuity of that value; but that, as she was married at the time, and also deranged, the annuity was purchased in the name of the testator; and the testator sent to Dubost, by his desire, a power of attorney, authorizing him to transfer to Marie Genevieve Garos the said annuity, dated the 10th of June, 1808.

The report further found, upon the affidavit of Dubost and the copy of the deed, that the first intimation he received of the death of the testator, who died in June, 1809, was in November, 1809; and that, in ignorance of such death, Dubost, on the 21st of October, 1809, exercised the power vested in him, by executing to Marie Genevieve Garos, her late husband being then dead, and she of sound mind, a deed of gift of the said annuity; and the Master found that, by the law of France, if an attorney be ignorant of the death of the party who has given the power of attorney, whatever he has done while ignorant of such death is valid. The Master, therefore, stated his opinion that the annuity was no part of the personal estate of William Mowbray.

The first petition prayed that so much of the report as certifies the French annuity to be no part of the testator's personal estate may be set aside; and that it may be declared that the said annuity is part of his personal estate. . . .

Sir Arthur Piggot, Mr. Richards, Mr. Wingfield, Mr. Horne, and Mr. Wear, for different parties, in support of the first petition. The French annuity being purchased in the testator's name, and no third person interposed as a trustee, the interest could not be transferred from him without certain acts, which were not done at the time of his death. It was therefore competent to him, during his life, to change his purpose, and to make some other provision for this lady by funds in this country; conceiving, perhaps, that she might return here. The authority given to purchase this annuity could not have been enforced against him during his life by a person claiming as a volunteer; nor can it be established against his estate after his death, the act which would have given the benefit of it against the personal representative not having been completed. *Cotton v. Missing*, 1 Madd. 176. See 2 Ves. Jr. 120, note. Where a question is to be decided by a foreign law, the first step is an inquiry by the Master to ascertain what is the law of that country. . . .

Sir Samuel Romilly and Mr. Bell, contra. . . .

THE LORD CHANCELLOR [ELDON]. . . . The other question involves not only the construction of the French law, and the point whether that has been sufficiently investigated, but further, whether the power of attorney amounts here to a declaration of trust. It is clear that this court will not assist a volunteer; yet, if the act is completed, though voluntary the court will act upon it. It has been decided that, upon an agreement to transfer stock, this court will not interpose; but if the party had declared himself to be the trustee of that stock, it becomes the property of the *cestui que trust* without more; and the court will act upon it.

June 13th. THE LORD CHANCELLOR. These petitions call for the decision of points of more importance and difficulty than I should wish to decide in this way, if the case was not pressed upon the court. With regard to the French annuity, the Master has stated his opinion as to the French law, perhaps without sufficient authority, or sufficient inquiry into the effect of it, as applicable to the precise circumstances of this case; but it is not necessary to pursue that, as upon the documents before me it does appear that, though in one sense this may be repre-

sented as the testator's personal estate, yet he has committed to writing what seems to me a sufficient declaration that he held this part of the estate in trust for the annuitant.¹ . . .

Under this judgment, the order was pronounced dismissing the first petition. . . .



SMITHWICK v. BANK OF CORNING.

SUPREME COURT, ARKANSAS. 1910.

95 Ark. 463.

BATTLE, J. On the 27th day of January, 1901, J. J. Smithwick departed this life, intestate, leaving C. A. Smithwick, his widow, and W. R. Smithwick his only heir. At the time of his death he was the owner of considerable real estate, and two thousand dollars in cash and notes, and about forty head of cattle. After his death the widow and heir by a written contract divided the estate of the deceased between themselves. In the division some money was set apart to the widow. She

¹ In *Forrest v. Forrest*, 34 L. J. Ch. 428, Stuart, V. C., remarked (p. 432): "In some cases this court has gone extremely far, and particularly in that of *Ex parte Pye*, *Ex parte Dubost*, where Lord Eldon went extraordinarily far certainly, to hold a gift valid which was very imperfect. But Lord Eldon found his way, with that extraordinary power which he possessed, to satisfy his mind that a power of attorney by the donor to receive the dividends could be construed to amount to a declaration of trust."

In *Smith v. Ward*, 15 Sim. 56, A directed his agents to purchase stock in the name of A and his wife in trust for B. The company objected to having a trust appear on its books and the agents therefore took the stock simply in the name of A and his wife. A was informed of this fact and received and used the dividends until his death. It was held that no trust was created.

In *Scales v. Maude*, 6 DeG. M. & G. 43, 51 (1855), Lord Cranworth, C., stated that a declaration of trust in favor of a volunteer is invalid. But ten years later, in *Jones v. Locke*, 1 Ch. App. 25, 28, the same judge said: "There is no doubt also that, by some decisions, unfortunate I must think them, a parol declaration of trust of personalty may be perfectly valid even when voluntary."

The validity of a gratuitous declaration of trust is now generally admitted, *Smith's Est.*, 144 Pa. 428; *Ames*, 125n.; *Lewin, Trusts*, 71; *Perry, Trusts*, sec. 96; *Pomeroy, Eq. Juris.*, sec. 996.

In the following cases a gratuitous declaration of trust of land was upheld: *Steele v. Waller*, 28 Beav. 466 (copyhold); *Lynch v. Rooney*, 112 Cal. 279 (decided under a statute); *Schumacher v. Dolan*, 154 Iowa 207. But see *Pittman v. Pittman*, 107 N. C. 159, *contra*. Cf. *Rood, The Statute of Uses and the Modern Deed*, 4 Mich. L. Rev. 109, 121.

deposited it in a bank to her credit. She often referred to it as W. R. Smithwick's money, but never relinquished control over it, and always controlled it, collecting interest on it.

Mrs. Smithwick died on the 16th day of July, 1908, leaving a last will and testament. She left nothing to W. R. Smithwick. G. B. Oliver became administrator of her estate. W. R. Smithwick brought a suit against the bank, claiming the money deposited in the bank as held in trust for him. Oliver, as administrator, was made a defendant.

The court, after hearing the evidence, dismissed the complaint for want of equity; and plaintiff appealed.

The money received by the widow in the division of the estate of her husband was her absolute property. Her frequent declarations that it was the appellant's money did not convert it into a trust fund. They manifested an intention to give the same to appellant at some time. But they were not based on any consideration, and were not binding on her. Intention without acts is of no effect.

*Decree affirmed.*¹

MORGAN v. MALLESON.

CHANCERY. 1870.

L. R. 10 Eq. 475.

THE following memorandum was given by John Saunders, the testator in the cause, to his medical attendant, Dr. Morris: —

"I hereby give and make over to Dr. Morris an India bond, No. D., 506, value 1,000*l.*, as some token for all his very kind attention to me during illness.

"Witness my hand, this 1st day of August, 1868,

(Signed)

"JOHN SAUNDERS."

The signature was attested by two witnesses, and the memorandum was handed over to Dr. Morris, but the bond, which was transferable by delivery, remained in the possession of Saunders. There was no consideration for it.

Saunders died more than a year afterwards, having by his will bequeathed the residue of his personal estate to charities. A suit was instituted for the administration of his estate, and a summons was taken out by the Attorney General on behalf of

¹ *Cotteen v. Missing*, 1 Madd. 176; *Dipple v. Corles*, 11 Hare 183; *Jones v. Lock*, L. R. 1 Ch. App. 25, *accord.* See 12 L. R. A. (N. S.) 547.

absent charities for the direction of the court on the question whether this memorandum was or was not a valid declaration of trust in favor of Dr. Morris.

LORD ROMILLY, M. R. I am of opinion that the paper-writing signed by Saunders is equivalent to a declaration of trust in favor of Dr. Morris. If he had said, "I undertake to hold the bond for you," or if he had said, "I hereby give and make over the bond in the hands of A.," that would have been a declaration of trust, though there had been no delivery. This amounts to the same thing; and Dr. Morris is entitled to the bond, and to all interest accrued due thereon.¹

RICHARDS *v.* DELBRIDGE.

CHANCERY. 1874.

L. R. 18 Eq. 11.

DEMURRER. The bill, filed by Edward Bennetto Richards, an infant, by his next friend, stated that John Delbridge, deceased, was possessed of a mill, with the plant, machinery, and stock in trade thereto belonging, in which he carried on the business of a bone manure merchant, and which was held under a lease dated the 24th of June, 1863.

That on the 7th of March, 1873, John Delbridge indorsed upon the lease and signed the following memorandum:—

"7th March, 1873. This deed and all thereto belonging I give to Edward Bennetto Richards from this time forth, with all the stock in trade.

"JOHN DELBRIDGE."

That the plaintiff was the person named in the memorandum, and the grandson of John Delbridge, and had then for some time assisted him in the business; that John Delbridge, shortly after signing the memorandum, delivered the lease on his behalf

¹ Richardson *v.* Richardson, L. R. 3 Eq. 686, *accord*.

A gift of a chattel is imperfect if there is neither delivery of the chattel nor of a deed of gift. *Irons v. Smallpiece*, 2 B. & A. 551; *Cochrane v. Moore*, 25 Q. B. D. 57. A deed of gift of a chattel vests the title in the donee without delivery. *Ames*, 130n. See also Y. B. 42 Ed. III, f. 1. pl. 7; *Foster v. Mitchell*, 15 Ala. 571; *Hope v. Hutchins*, 9 Gill & J. (Md.) 77; *McWillie v. Van Vachter*, 35 Miss. 428; *Gordon v. Wilson*, 4 Jones (N.C.) 64; *McEwen v. Troost*, 1 Sneed (Tenn.) 186. And see Warren, *Cas. Prop.*, 198-214; *Bigelow, Cas. Pers. Prop.*, 260-263.

to Elizabeth Ann Richards, the plaintiff's mother, who was still in possession thereof.

That John Delbridge died in April, 1873, having executed several testamentary instruments which did not refer specifically to the said mill and premises, but gave his furniture and effects, after his wife's death, to be divided among his family.

That the testator's widow, Elizabeth Richards, took out administration to his estate, with the testamentary papers annexed.

The bill, which was filed against the defendants, Elizabeth Delbridge, Elizabeth Ann Richards, and the testator's two sons, who claimed under the said testamentary instruments, prayed a declaration that the indorsement upon the lease by John Delbridge and the delivery of the lease to Elizabeth Ann Richards created a valid trust in favor of the plaintiff of the lease¹ and of the estate and interest of John Delbridge in the property therein comprised, and in the good will of the business carried on there, and in the implements and stock in trade belonging to the business.

The defendants demurred to the bill for want of equity.

SIR G. JESSEL, M. R. This bill is warranted by the decisions in *Richardson v. Richardson*, L. R. 3 Eq. 686, and *Morgan v. Malleeson*, L. R. 10 Eq. 475; but, on the other hand, we have the case of *Milroy v. Lord*, 4 De G. F. & J. 264, before the Court of Appeal, and the more recent case of *Warriner v. Rogers*, L. R. 16 Eq. 340, 348, in which Vice-Chancellor Bacon said: "The rule of law upon this subject I take to be very clear, and with the exception of two cases which have been referred to" (*Richardson v. Richardson* and *Morgan v. Malleeson*), "the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust — the indispensable thing — I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect, and put the property out of his power, at least in the way of interest."

The two first mentioned cases are wholly opposed to the two last. That being so, I am not at liberty to decide the case otherwise than in accordance with the decision of the Court of Appeal. It is true the judges appear to have taken different

¹ The assignment of the term, not being by deed, was void under Stat. 8 & 9 Vict. c. 106, sec. 3.

views of the construction of certain expressions, but I am not bound by another judge's view of the construction of particular words; and there is no case in which a different principle is stated from that laid down by the Court of Appeal. Moreover, if it were my duty to decide the matter for the first time, I should lay down the law in the same way.

The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.

The cases in which the question has arisen are nearly all cases in which a man, by documents insufficient to pass a legal interest, has said, "I give or grant certain property to A. B." Thus, in *Morgan v. Malleon* the words were, "I hereby give and make over to Dr. Morris an India bond;" and in *Richardson v. Richardson* the words were, "grant, convey, and assign." In both cases the judges held that the words were effectual declarations of trust. In the former case, Lord Romilly considered that the words were the same as these: "I undertake to hold the bond for you"; which would undoubtedly have amounted to a declaration of trust.

The true distinction appears to me to be plain, and beyond dispute; for a man to make himself a trustee, there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise.

In *Milroy v. Lord*, Lord Justice Turner, after referring to the

two modes of making a voluntary settlement valid and effectual, adds these words: "The cases, I think, go further, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

It appears to me that that sentence contains the whole law on the subject. If the decisions of Lord Romilly and of Vice-Chancellor Wood were right, there never could be a case where an expression of a present gift would not amount to an effectual declaration of trust, which would be carrying the doctrine on that subject too far. It appears to me that these cases of voluntary gifts should not be confounded with another class of cases in which words of present transfer for valuable consideration are held to be evidence of a contract which the court will enforce. Applying that reasoning to cases of this kind, you only make the imperfect instrument evidence of a contract of a voluntary nature, which this court will not enforce; so that, following out the principle even of those cases, you come to the same conclusion.

I must, therefore, allow the demurrer, and, though I feel some hesitation, owing to the conflict of the authorities, I think the costs must follow the result.¹

MERITORIOUS CONSIDERATION. It has been held in many cases that a meritorious consideration is sufficient to turn an imperfect gift into a perfect trust. Thus an attempted gift made by a husband to a wife has been enforced in equity as a trust. *Ames*, 164-175. See also *Thomas v. Hornbrook*, 259 Ill. 156; *Dayton etc. Co. v. Sloan*, 47 Neb. 622; *Estate of Wise*, 182 Pa. 168.

¹ It is now well settled that an imperfect gift will not be held effective as a declaration of trust. *Milroy v. Lord*, 4 De G. F. & J. 264; *West v. West*, L. R. 9 Ir. 121; *Re Webb's Estate*, 49 Cal. 541; *Pratt v. Griffin*, 184 Ill. 514; *Clay v. Layton*, 134 Mich. 317; *Ames*, 130n., 133n.; 16 Ann. Cas. 373.

But if the owner of land intends to make a common-law conveyance which is ineffective as such, it will be upheld if possible as a bargain and sale or as a covenant to stand seised. *Roe v. Tranmer*, 2 Wils. 75; *Warren, Cas. Prop.*, 534; *Gray, Rule ag. Perp.*, sec. 65n.; 4 Mich. L. Rev. 111n.

In England after some vacillation the courts finally rejected this doctrine. *Re Breton's Estate*, 17 Ch. D. 416.

A meritorious consideration is not sufficient to sustain an executory agreement. *Landon v. Hutton*, 50 N. J. Eq. 500; *Matter of James*, 146 N. Y. 78. But see *Crawford's App.*, 61 Pa. 52.

This matter is now largely regulated by statute.

HERBERT *v.* SIMSON.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1915.

220 Mass. 480.

BILL IN EQUITY, filed in the Probate Court of the county of Middlesex on November 13, 1911, by the executor of the will of Adeline L. Nickerson for instructions as to the disposition to be made by him of a certificate for ten shares of the preferred stock of the American Agricultural Chemical Company, a corporation established under the laws of the State of Connecticut, held by him as executor and claimed by the defendant as a gift made to her by the testatrix in her lifetime.

The Probate Court made a decree that no gift of the shares of stock had been made to the defendant and that the shares were assets of the estate in the hands of the plaintiff. The defendant appealed.

The appeal was heard by Loring, J., who made certain findings of fact which are stated in the opinion, and at the request of the parties reserved the case for determination by the full court upon the findings made by him.

DE COURCY, J. It is settled by the finding of the single justice that on the fifth day of December, 1908, for the reasons set forth in the reservation, Mrs. Nickerson undertook to make a gift to Mrs. Simson of ten shares of the preferred stock of the American Agricultural Chemical Company; that pursuant thereto she delivered the unindorsed certificate for the shares to Mrs. Simson, who then accepted it on the terms on which it had been delivered to her. Thereafter it was kept by Mrs. Simson in her trunk in her own room. The question before us is whether the alleged gift was incomplete, and therefore ineffectual, because of the failure on Mrs. Nickerson's part to assign the certificate by signing the form on the back thereof, or by executing some other written instrument.

The charter and by-laws of the corporation contain no provision concerning the transfer of certificates of shares; and no statute of the State of its incorporation has been called to our attention that affects the question. No rights of creditors or other third parties are involved, but only those of donor and donee. It should be added that St. 1910, c. 171, §9, which provides for such a case as this, was passed after the gift in controversy.

The failure of Mrs. Nickerson to indorse the share certificate was important evidence bearing on the intention with which the delivery was made; but it is settled by the finding of the single justice that she did in fact intend to make a completed gift and irrevocably to renounce dominion and control of the stock, and that Mrs. Simson accepted it as her own property. Nevertheless, without the written assignment Mrs. Simson did not acquire the legal title to the shares, — the ownership in the sense that no further act was required to perfect her right. *Fisher v. Essex Bank*, 5 Gray, 373. *Stone v. Hackett*, 12 Gray, 227. Note to *Milroy v. Lord*, 1 Ames, Cases on Trusts, 149. What she did acquire was, as between herself and the donor, the equitable title to the shares and some legal as well as equitable rights. The gift was complete, and not inchoate; and a court of equity has jurisdiction to compel a formal assignment by the executor of the donor, and a transfer on the books of the corporation.

The general rule is now well established that choses in action, of which the legal or equitable title can pass by delivery, may be the subject of a valid gift. And the delivery of the chose in action, without formal indorsement or assignment, is sufficient to effectuate the gift where it is the intent and purpose of the donor to transfer the ownership at once. The principle has been applied by this court to the gift of a promissory note, payable to the order of the donor and not indorsed. *Grover v. Grover*, 24 Pick. 261. It was held in *Pierce v. Boston Five Cents Savings Bank*, 129 Mass. 425, that the delivery of a savings bank book (which is analogous to a stock certificate in many respects), without a written assignment or order, was sufficient to constitute a valid gift. A share of capital stock is property of a peculiar kind. Accurately speaking it does not consist in an interest either legal or equitable in the property of the company. It is personalty although the corporation may own real estate. If not a chose in action it is in the nature of

a chose in action. The share certificate is evidence of title, and for some purposes may possess some of the incidents of property. While not negotiable, shares are freely assignable and in this respect resemble negotiable choses in action and tangible property rather than other non-negotiable choses in action. As was said by Rugg, C. J., in *Kennedy v. Hodges*, 215 Mass. 112, 115: "Modern commercial usage treats certificates of stock as possessing some of the attributes of property. They are generally bought and sold and pass by delivery when properly indorsed like ordinary chattels." There is nothing in the nature of a share of stock to prevent the passing of the equitable title to the share, as between the donor and donee, by the delivery of the share certificate, where such is the manifest intent of the parties.

The question now before us has not been decided in this Commonwealth, although it arose in *Morse v. Meston*, 152 Mass. 5. But in the large majority of cases where it has arisen in other jurisdictions in this country it has been decided that the delivery of the share certificate, with the intention of passing title to the donee at the time but without formal assignment, will constitute a valid gift. [Cases cited.]

The injustice of a contrary conclusion is well expressed by Dean Ames in his note to *Milroy v. Lord*, *ubi supra* (p. 156): "Even in jurisdictions where the gift is ineffectual unless the shares, or deposit, are transferred on the books of the company or savings bank, the donor would not be allowed to recover the certificate or bank book after he had once delivered them with the intention of vesting them in the donee. . . . We should have, then, this extraordinary condition of things: the donee unable to transfer the shares or collect the deposit, because the gift is not deemed complete; the donor equally helpless, because he cannot produce the certificate or bank book; the company or bank, on the other hand, in a position capriciously to recognize the donor or the donee as *dominus* of the claim, or, indeed, unless they come to some compromise, to refuse with safety to recognize either."

We are of opinion that the delivery by Mrs. Nickerson to the defendant of the share certificate and its acceptance by the latter constituted a valid gift and vested in the donee the equitable title to the property. The provision printed on the certificate that the shares are "transferable only on the Books of the Company," affects the shareholder's relation to the corporation

only, and not her relation to a third party who has become equitably possessed of the stock. See cases cited in Ann. Cas. 1912 C 1235, note.

The decree of the Probate Court is reversed, and a decree is to be entered instructing the executor that the certificate for ten shares of the preferred stock of the American Agricultural Chemical Company is the property of the defendant Malvina J. Simson, and directing him to assign the same to her.

*Ordered accordingly.*¹

¹ A gift of stock is valid and irrevocable when there has been delivery of the certificates with an express power of attorney to transfer the shares on the company's books. *Kiddill v. Farnell*, 3 Sm. & G. 428; *Calkins v. Equitable etc. Ass'n*, 126 Cal. 531; *Tucker v. Tucker*, 138 Iowa 344; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Walker v. Dixon etc. Co.*, 47 N. J. Eq. 342; *Matthews v. Hoagland*, 48 N. J. Eq. 455, 486; *Cushman v. Thayer etc. Co.*, 76 N. Y. 365; *Talbot v. Talbot*, 32 R. I. 72. See *West v. West*, L. R. 9 Ir. 121, 126.

A deed of transfer with an express power of attorney should be effectual although the certificates are not delivered. *Grymes v. Hone*, 49 N. Y. 17 (*mortis causa*).

A delivery of the certificates by way of gift without an express power of attorney has been held sufficient. *Allen-West etc. Co. v. Grumbles*, 129 Fed. 287; *Grimes v. Barndollar*, 58 Colo. 421; *Reed v. Copeland*, 50 Conn. 472; *Lorimer v. Beardsley*, 130 Iowa 706; *Denunzio v. Scholtz*, 117 Ky. 182; *Leyson v. Davis*, 17 Mont. 220 (*mortis causa*); *Kaufmann v. Parmele*, 99 Neb. 622; *Bond v. Bean*, 72 N. H. 444; *Allerton v. Lang*, 10 Bosw. (N. Y.) 362; *Walsh v. Sexton*, 55 Barb. (N. Y.) 251 (*mortis causa*); *Ridden v. Thrall*, 125 N. Y. 572, 577 (*semble*); *Gilkinson v. Third Ave. R. R. Co.*, 47 N. Y. App. Div. 472; *Matter of Mills*, 172 N. Y. App. Div. 530; *Herbert v. Simson*, 220 Mass. 480; *Comm. v. Crompton*, 137 Pa. 138; *Pryor v. Morgan*, 170 Pa. 568; *Thomas v. Lewis*, 89 Va. 1 (*mortis causa*); *First Nat. Bk. v. Holland*, 99 Va. 495. But see *contra*, *Milroy v. Lord*, 4 D. F. & J. 264; *Re Weston*, [1902] 1 Ch. 680 (*mortis causa*); *Re Andrews*, [1902] 2 Ch. 394 (*mortis causa*); *Matthews v. Hoagland*, 48 N. J. Eq. 455, 486; *Heyer v. Sullivan*, 88 N. J. Eq. 165.

A deed of transfer should have the same effect as a delivery. *De Caumont v. Bogert*, 36 Hun (N. Y.) 382.

If a gift of stock is effected by delivery of the certificates, neither the fact that the certificates are given back into the possession of the donor nor the fact that the donor intends to reserve the right to the dividends for his life will prevent the gift from being effective. *Larimer v. Beardsley*, 130 Iowa 706; *Tucker v. Tucker*, 138 Iowa 344; *Talbot v. Talbot*, 32 R. I. 72. But the whole transaction is sometimes ineffective because involving a violation of the Statute of Wills. See *post*, Chap. II, sec. IV.

The Uniform Stock Transfer Act provides that title to shares of stock may be transferred only by delivery of the certificate duly indorsed or accompanied by a written assignment or power of attorney. If the certificate is delivered without indorsement but with intent to transfer the shares, the

FARRELL *v.* THE PASSAIC WATER CO.

COURT OF CHANCERY, NEW JERSEY. 1913.

82 N. J. Eq. 97.

STEVENS, V. C. This is a bill filed by the administratrix of Catherine Farrell against the Passaic Water Company and the executors of James Atkinson. It is alleged that Mr. Atkinson was engaged to be married to Miss Farrell, and that about the year 1905, [1895?] and while so engaged, he handed her a coupon bond of the Passaic Water Company for \$1,000, intending to make her a gift of it. The bond was, at the time of the alleged gift, and still is, registered, as to principal, in the name of Atkinson. The principal sum is payable in July, 1937. Miss Farrell drew the interest coupons during her life and died in 1909. Atkinson died in 1902. Since the death of Miss Farrell, the bond has been in the possession of either her next of kin or her administratrix. On its face it provides that it is payable to the bearer or registered holder thereof and that it "may at any time be registered in the name of the owner on the books of the company; . . . after which this bond shall be transferable only upon the books of the company, until it shall, at the request of the holder, be registered as payable to bearer, which shall restore transferability by delivery."

The bill prays that the bond may be declared to be a part of the estate of Catherine Farrell, and that the company may be decreed to register it in the name of her administratrix.

The defence is, first, that no gift is proven, and second, that if an intention to give has been shown, such gift was imperfect

transferor may be compelled to complete the transfer by indorsement. If the certificate is not delivered, there is at most a promise to transfer, governed as to its enforceability by the law of contracts.

In general as to gratuitous transfers of stock, see Ames, 155n.; Lowell, Transfer of Stock, secs. 43, 44; 24 Harv. L. Rev. 481; 2 L. R. A. (N. S.) 806; 29 L. R. A. (N. S.) 166; L. R. A. 1915D 733; Ann. Cas. 1912C 1235.

Cases of assignments of *choses* in action are inserted in this book for three reasons: (1) Since an imperfect assignment will not be upheld as a declaration of trust, it is important to distinguish an assignment from a declaration of trust. (2) Frequently the assignment is upon trust, and the validity of the trust depends upon the validity of the assignment. (3) The interest assigned may be the interest of a *cestui que trust* (Donaldson *v.* Donaldson, *post*, p. 170), and the validity of such an assignment is to be considered in connection with the question of the validity of an assignment of a legal interest.

without registry and a court of equity will not lend its aid to perfect it.

Nothing is better settled than that there is no equity to perfect an imperfect gift. Says Sir George Jessel, M. R., in *Richards v. Delbridge*, L. R. 18 Eq. 11: "The principle is a very simple one. A man may transfer his property without valuable consideration in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property and thus completely divest himself of the legal ownership in which case the person who by those acts acquires the property takes it beneficially or on trust, as the case may be; or the legal owner of the property may by one or other of the modes recognized as amounting to a valid declaration of trust constitute himself a trustee and without an actual transfer of the legal title may so deal with the property as to deprive himself of its beneficial ownership and declare that he will hold it from that time forward in trust for the other person."

There is nothing in this case to indicate that Atkinson declared that he held the bond in controversy as trustee for Miss Farrell. What he did was not to set it aside among his own papers and to declare in any way that from that time forth, he held it for her benefit, but to give her the possession of it, and, as far as appears, concern himself no further about it. If, says the master of the rolls, in the case cited, the gift is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.

If, then, the complainant has a valid title, it must be because Atkinson completely divested himself of all title.

I think considerable confusion has resulted from the use, in some of the later cases, of the term "equitable" in connection with the title of the assignee to a chose in action. If by "equitable" is meant such a title as only a court of equity can give effect to, the assumption is manifestly erroneous. If a right is recognized, and protected by a court of law (of course, I am speaking of those jurisdictions in which the courts of law and equity are still constitutionally distinct), and if such a court has come to be the proper tribunal in which to enforce it, it is a misuse of terms to call the right equitable in contradistinction to legal.

The history of the law on this subject is somewhat curious.

In the time of Coke, the property in the paper on which an obligation was written and in the wax with which it was sealed could be divorced from the property in the debt which the paper manifested. He says (Fol. 232*b* §377): "it is implied that if a man hath an obligation, though he cannot grant the thing in action, yet he may give or grant the deed, viz., the parchment and wax, to another who may cancel and use the same at his pleasure."

This distinction constituted the basis of decision by the Lords-Justices in *Rummens v. Hare*, 1 Ex. D. 169, as late as 1876.

Property in the debt evidenced by the paper stood on a different footing. As the advantages arising from commerce began to be felt, the custom of merchants whereby a foreign bill of exchange was assignable by the payee to a third person so as to vest in him the *legal* as well as the equitable title, was recognized and supported by the English law courts as early as the fourteenth century, and a like custom rendering an inland bill transferable was established in the seventeenth century. Chit. Bills *10. Promissory notes were put upon the footing of inland bills by the statute of 7 Anne. Other choses in action long stood upon a different footing. Lord Coke (214*a*) says that it is one of the maxims of the common law that no right of action can be transferred, "because under color thereof pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth."

But the necessities of trade and commerce were too strong for this maxim, and courts of equity at an early period began to recognize the interest of the assignee. During this period the title of the assignee was equitable, and equitable only. Then the law courts began, indirectly at first, to recognize his right. In *Winch v. Keeley*, 1 T. R. 619 (A. D. 1787), they did so for the first time explicitly. There a suit was brought in the name of the assignor for the use of the assignee. The defence was that the assignor had become bankrupt and that his title had passed to his assignee in bankruptcy. It was held that the title had not passed and that the suit would lie. Having recognized and protected the assignee's right, it became, at least to some extent, a mere question of procedure whether the suit should be brought in the one name or the other. This was the view of Mr. Justice Buller in *Master v. Miller*, 4 T. R. 341 (A. D. 1791). He says: "It must be admitted that though the courts

of law have gone the length of taking notice of choses in action and acting upon them, yet in many cases they have adhered to the formal objection that the action shall be brought in the name of the assignor and not in the name of the assignee. I see no use or convenience in preserving that shadow when the substance is gone, and that it is merely a shadow is apparent from the later cases in which the courts have taken care that it shall never work injustice." Still, in England, the action continued for many years to be brought in the name of the assignor. But it became mere form, for, said Chief-Justice Hornblower, in *Allen v. Pancoast*, 20 N. J. Law (Spenc.) 68: "It has long since been held that an assignment of a chose in action carries with it by implication a right to use the name of the assignor even against his consent and in opposition to his release or defeasance of the debt or security assigned."

It is going pretty far to call the right of such an assignee, so protected, an *equitable* in contradistinction to a *legal* right. But when our legislature in 1797 enacted that the "assignment of bills, bonds and other writings obligatory for the payment of money shall be good and effectual in law and an assignee of any such may thereupon maintain an action of debt in his own name," the only excuse for calling the assignee's title equitable vanished. *Reed v. Bambridge*, 4 N. J. Law (1 South.) 358. The legal title to the wax and paper had always been in the assignee, the legal title to the debt was now also in the assignee.

It thus conclusively appears that the aid of a court of equity to perfect the title of an assignee to a sealed bond for the payment of money is unnecessary, for the right is perfect already. Agreements to assign stand upon quite another footing. If based upon valuable consideration, equity may sometimes enforce them; if not so based, it will not.

Then a perfectly distinct question arises. By what formalities may title be vested in an assignee? At first it was held that an instrument under seal could only be assigned by an instrument of equal dignity (*Wood v. Partridge*, 11 Mass. 488); but this view has been abandoned, and it is now held that instruments such as bonds, mortgages and policies of insurance may be assigned by writing without seal, or even by parol accompanied by delivery. *Vreeland v. Van Horn*, 17 N. J. Eq. (2 C. E. Gr.) 137; *Travelers Insurance Co. v. Grant*, 54 N. J. Eq. (9 Dick.) 208; *Allen v. Pancoast*, 20 N. J. Law (Spenc.) 71. The effect of the assignment is precisely the same in any of these forms —

it vests the legal title in the assignee. The proof of it may be more difficult in the case of an assignment by parol, but in any mode the debt theretofore owing to the obligee passes to the assignee; he is the creditor, and the only creditor.

These several modes of assignment are as applicable to the case of gifts as to those of transfers for value. The gift is just as completely vested by the one mode as by the other, and it is settled law that the fact that the bond is not payable to bearer or that the instrument is not negotiable does not prevent a valid gift of it by manual tradition without writing. *Executors of Egerton v. Egerton*, 17 N. J. Eq. (2 C. E. Gr.) 421; *Corle v. Monkhouse*, 50 N. J. Eq. (5 Dick.) 537; *Travelers Insurance Co. v. Grant*, 54 N. J. Eq. (9 Dick.) 208; *Thompson v. West*, 56 N. J. Eq. (11 Dick.) 660. Proof of delivery, coupled with proof of intent to pass a present interest by way of gift, has precisely the same effect as a formal written transfer. A moment's consideration will show that this is necessarily so. The instrument given remains, in either case, unchanged. If payable by A to B it remains so payable on the face of it, whether transferred by writing or not; but by the effect of the transfer, what theretofore was payable to B has in law become payable to C, the transferee. In the case of *Green v. Tulane*, 52 N. J. Eq. (7 Dick.) 169, the question was not before the court. I do not think it can be fairly gathered from what Vice-Chancellor Pitney said that he thought that a writing was necessary, but if he there so expressed himself, when the point came squarely before him, in the Insurance Case, he held otherwise. The question then is, did Atkinson make a gift — that is, a perfect gift? Two objections are made — *first*, it is said that the proof fails to show delivery accompanied with a declaration of intent, and *secondly*, that the instrument itself forbids the making of a gift in the manner in which it is alleged to have been made.

As to the first objection: The evidence is that Atkinson, a business man of mature years, possessed of considerable property, while engaged to be married to Miss Farrell, parted with the bond in question; how or when does not appear. Although he lived for six or seven years after it came into Miss Farrell's possession, he did not reclaim it; reclamation being all the more easy because of the fact that the bond stood registered in his name. He told a friend that he had made Miss Farrell a present of a bond of that description. She took the interest accruing upon it for ten or twelve years before her death. It was natural

that, situated as they were, he should have made a gift, and there is no evidence against it. Under these circumstances, I think the inference that a gift was actually made is the only fair inference from the proofs.

But counsel argues that, conceding that an intention to give is proved, the gift remains incomplete because of the clauses in the bond, which provide that it is payable to the bearer or registered holder, and that if registered, it shall be transferable only on the books of the company, until it shall, at the request of the holder, be registered payable to bearer, "*which shall restore transferability by delivery.*"

There are two kinds of corporation bonds in common use to-day — those that are negotiable and those that are merely assignable. It seems quite apparent that the object of the clause in question was to give the owner the option of having either the one form of obligation or the other, at his pleasure. It is hardly to be supposed that the company was endeavoring to put upon the market a new kind of obligation, viz., one, *title* to which would not pass from one man to another unless or until there was an actual transfer on the books. The implied prohibition against transfer would be just as effective in the case of a written assignment, even an assignment under seal, as in the case of a verbal one. There might indeed be a question whether such a limitation could be made effective; but here, I do not think it was intended to impose it. The clause was probably suggested by the similar one put in the ordinary stock certificate, as to which Chancellor Green said: "The title of the holder is in nowise affected by a provision in the charter or by-laws of the corporation that the stock is transferable only on the books of the corporation. Such a provision is intended merely for the protection and benefit of the corporation." The fact that in the one case the provision is intended chiefly to protect the company and in the other the bondholder, can make no difference, so far as the point under consideration is concerned. It is well settled that as between the transferrer and transferee, title to the stock certificate is completely vested without transfer on the books. *Matthews v. Hoagland*, 48 N. J. Eq. (3 Dick.) 486.

But it is said that the failure to direct the company to make a transfer on its books is evidence that Atkinson did not intend his gift to be irrevocable. If the facts justify the inference that he did so intend, proof that he failed to authorize the company

by power of attorney to make a transfer is immaterial. He had, I have shown, the option of making the gift with or without writing. Such failure might indeed be a circumstance militating against the gift, if coupled with other circumstances throwing doubt upon it. Standing by itself, it is without significance as long as it is the doctrine of this court that a valid gift may be made by parol. Proof of failure to make in one way is no proof of failure to make in another.

Considering, as I do, that the question as between the administratrix of Miss Farrell and the executor of Mr. Atkinson is one of legal title — title of which the law courts take cognizance — it would seem to follow that if there were a real doubt as to who was legal owner, that doubt would have to be, under our system, settled by the law courts. There is, however, no dispute as to the material facts and no reasonable doubt as to the inference to be drawn from them. The case seems really to be one between the administratrix and the water company; Atkinson's executors being proper parties because their testator stands upon the company's books as registered owner. There is proof that a request to register was made by the administratrix and that such request was refused. If a court of equity has jurisdiction to decree a registry of stock (*Archer v. American Water Co.*, 50 N. J. Eq. (5 Dick.) 50; *Reilly v. Absecon Land Co.*, 75 N. J. Eq. (5 Buch.) 71), I see no good reason why it may not compel performance of the company's agreement to register the bond. A suit for damages, based on a refusal to do so, would not be a complete or satisfactory remedy.

Under the peculiar circumstances of the case neither party should have costs.¹

BILLS AND NOTES. — As to the validity of a gift of a non-negotiable bill of exchange or promissory note, or of a gift without indorsement of a negotiable bill or note, see *Duffield v. Elwes*, 1 Bligh (N. s.) 497; *Wright v. Bragg*, 106 Fed. 25; *Walker v. Crews*, 73 Ala. 412 (delivery of deed of gift); *Edwards v. Wagner*, 121 Cal. 376; *Grover v. Grover*, 24 Pick. (Mass.) 261; *MacKeown v. Lacey*, 200 Mass. 437; *Hoyt v. Gillen*, 181 Mich.

¹ By the weight of authority the delivery of a bond or of a deed of gift of a bond is sufficient to effect a gift of the bond. *Tarbox v. Grant*, 56 N. J. Eq. 199 (deed of gift); *Funston v. Twining*, 202 Pa. 88. The opposite result was reached in *Edwards v. Jones*, 1 Myl. & Cr. 226; but this case is probably overruled by *Re Patrick*, [1891] 1 Ch. 82. See *Ames*, 145n.

509; *Meyer v. Koehring*, 129 Mo. 15; *Egerton v. Carr*, 94 N. C. 648. See Ames, 162n.; Warren, Cas. Wills, 829, 830.

If a note is secured by mortgage, a delivery of the note by way of gift will give the donee the equitable interest in the security. *O'Connor v. McHugh*, 89 Ala. 531; *Druke v. Heiken*, 61 Cal. 346 (*mortis causa*); *Brown v. Brown*, 18 Conn. 410 (*mortis causa*); *Kiff v. Weaver*, 94 N. C. 276 (*mortis causa*). But see *contra*, *Tiffany v. Clarke*, 6 Grant Ch. (Upper Can.) 474, 481. A delivery of the mortgage deed without the note would seem to be insufficient. *McHugh v. O'Connor*, 91 Ala. 243. But see *Caufield v. Davenport*, 75 Hun (N. Y.) 541.

LIFE INSURANCE POLICIES. A parol gift of a life insurance policy is valid if the policy is delivered. *Knowles v. Knowles*, 205 Mass. 290; *Gledhill v. McCoombs*, 110 Me. 341; *Chapman v. McIlwraith*, 77 Mo. 38; *Travelers' Ins. Co. v. Grant*, 54 N. J. Eq. 208; *McGlynn v. Curry*, 82 N. Y. App. Div. 431 (in spite of provisions in the policy requiring written evidence of the assignment, which were held to be designed only for the protection of the insurance company); *Hani v. Germania etc. Co.*, 197 Pa. 276; *Barron v. Williams*, 58 S. C. 280; *Opitz v. Karel*, 118 Wis. 527. But in Georgia by statute the assignment must be in writing. *Steele v. Gatlin*, 115 Ga. 929.

So also a gift by deed is sufficient although the policy itself is not delivered. *Fortescue v. Barnett*, 3 Myl. & K. 36; *Pearson v. Amicable Co.*, 27 Beav. 229; *Kulp v. March*, 181 Pa. 627; *Hurlbut v. Hurlbut*, 49 Hun (N. Y.) 189. See Ames, 139n. In *Northwestern Mut. Life Ins. Co. v. Wright*, 153 Wis. 252, the insured attached a written assignment to the policy and sent a copy of the assignment to the insurer, in accordance with provisions of the policy. This was held to be a valid gift.

HILL v. STEVENSON.

SUPREME JUDICIAL COURT, MAINE. 1873.

63 Me. 364.

BILL IN EQUITY, brought by Harriet Hill and Isabella Stevenson against the latter's husband, as administrator of the estate of the late Alice Murch, who was the complainants' mother, setting out that, at the decease of Mrs. Murch, there was a sum of money deposited by her in the Saco and Biddeford Savings

Institution, and then standing in her name, which she had given to these two daughters, and had delivered the bank book to Nehemiah Hill, the husband of one of them, at the time of such gift, which was established by the testimony of Capt. Hill, who said he had the custody of the book from November, 1862, when the donation was made, till and after the death of Mrs. Murch in September, 1867. Capt. Hill thus described the donation: "She handed me that book — put it into my hand — and said that she gave the money in that bank — on that book — to my wife and Isabella Stevenson. She said, 'I give that to Harriet and Isabella.' She said she wanted me to take the book, and take care of it, and, after her decease, to divide the money equally between Harriet and Isabella. She said this money was her own private property, and no part of her husband's estate; that her husband gave each of the boys a homestead and about \$1000, but didn't give the girls anything. I took the book and have held it ever since till last January, when it was used in evidence in a case tried before the supreme court at Saco, and left with the clerk of the court with the papers in that case."

The depositions of the complainants, tending to support this statement, were also put in as proof. The bill complained that knowing these facts, the respondent refused to draw the funds from the savings bank or to give the complainants the book and an order for payment of the money to them; and prayed for a decree requiring him to do one or the other of these things.

Goodwin & Lunt, for the complainants. . . .

Edward Eastman, for the respondent. . . . The rules of the savings bank, printed in the book, and constituting part of the contract between it and the depositor, provided for a withdrawal or transfer of the funds, or any part of them, only by the depositor or upon a written and attested order.

APPLETON, C. J. A delivery to a donee of a savings bank book, containing entries of deposits to the credit of the donor, with the intent to give the donee the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits. *Camp's Appeal*, 36 Conn., 88. Such delivery vests the equitable title in the donee without assignment.

The delivery may be to the donee or to some other person for the donee. *Dole v. Lincoln*, 31 Maine, 422; *Marston v. Marston*, 21 N. H., 491; *Borneman v. Sidlinger*, 15 Maine, 429; *Wells v. Tucker*, 3 Binney, 366.

The evidence satisfactorily shows that Alice Murch the mother of the plaintiffs gave the money she had in the Saco & Biddeford Savings Bank to the plaintiffs by a delivery of her savings bank book to Nehemiah Hill for their use and benefit; that after such gift she ceased to have the possession of said book, or to exercise any control over the money deposited; and that the plaintiffs assented to and acquiesced in said gift. The plaintiffs have made out a perfect title to the money in controversy. . . .

The bill in equity may be sustained. The facts are similar to those in the case at bar, in *Gardner v. Merritt*, 32 Maryland, 78; and in *Coutant v. Schuyler*, 1 Paige, 317.

*Decree as prayed for.*¹

¹ The gift of a deposit in a savings bank is valid if the savings bank book is delivered with an express power of attorney or written assignment or order. *Larrabee v. Hascall*, 88 Me. 511 (gift *mortis causa* of entire deposit incorrectly described as a partial assignment); *McCarthy v. Provident Inst.*, 159 Mass. 527; *Brannan v. Eliot etc. Bk.*, 211 Mass. 532; *Re Barefield*, 177 N. Y. 387; *McGuire v. Murphy*, 107 N. Y. App. Div. 104; *Hill v. Escort*, 38 Tex. Civ. App. 487.

A delivery of the savings bank book has been held sufficient although the gift is not evidenced by any written instrument. *Re Weston*, [1902] 1 Ch. 680 (*mortis causa*); *Re Andrews*, [1902] 2 Ch. 394 (*mortis causa*); *Guinan's App.*, 70 Conn. 342; *Goulding v. Horbury*, 85 Me. 227 (*mortis causa*); *Van Wagenen v. Bonnot*, 72 N. J. Eq. 143, 74 N. J. Eq. 843 (*mortis causa*); *Laing v. Durand*, 84 N. J. Eq. 404; *Loucks v. Johnson*, 70 Hun (N. Y.) 565 (*mortis causa*); *Dinley v. McCullagh*, 92 Hun (N. Y.) 454 (*semble*); *Polley v. Hicks*, 58 Oh. St. 218; *Watson v. Watson*, 69 Vt. 243. But see *Walsh's App.*, 122 Pa. 177.

A savings bank book may be transferred by deed of gift without delivery of the book. *Tarbox v. Grant*, 56 N. J. Eq. 199.

If neither the book nor a deed of gift is delivered, the intended gift fails. *Pfeifer v. Badenhop*, 86 N. J. L. 492.

See further for a collection of cases involving gifts of savings bank deposits, *Ames*, 155n.; *Dec. Dig., Gifts*, 30, 66.

For cases involving deposits by A "in trust for" B, see *post*, Chap. III, sec. IV.

For cases involving deposits by A in the name of B, or of A and B, or of A or B, or the like, see *post*, Chap. IV, sec. IV.

Other Choses in Action represented by Specialties. The courts have upheld gifts of bank deposit receipts (*Porter v. Walsh*, [1895] 1 I. R. 284; *Re Griffin*, [1899] 1 Ch. 408; *Ames*, 156n.; *Warren, Cas. Wills*, 841n.), lottery tickets (*Ames*, 162n.), and exchequer tallies (*Ames*, 163n.). In *Re Lee*, [1918] 2 Ch. 320, the court upheld a gift *mortis causa* of "an Exchequer Bond Deposit Book" issued by the Post Office and containing a certificate of the holder's title to registered Exchequer bonds.

COOK *v.* LUM.

SUPREME COURT, NEW JERSEY. 1893.

55 N. J. L. 373.

BEASLEY, CHIEF JUSTICE. This case stands before the court on a special verdict, and the problem to be solved involves the legal efficacy of a gift of money.

The circumstances were these: The deceased, Ellen G. Green, who is here represented by her administrator, who is the defendant on this record, deposited with one Kase the sum of \$2,316, who thereupon gave to the said Ellen a paper containing in column eight several sums in figures, which were footed up and amounted to the sum just specified. The paper was dated "July 26th, 1890," and there was no other writing upon it.

After finding the foregoing facts, the special verdict proceeds as follows: "And the jurors aforesaid further say that except said paper, said John H. Kase never gave to said Ellen Green any evidence of indebtedness from himself to her for said deposit. . . . That said Ellen Green did actually deliver said paper into the hands of said Ellen G. Cook shortly before her, said Ellen Green's, death. That said Ellen Green delivered said paper into the hands of said Ellen G. Cook, with the intention of thereby giving to said Ellen G. Cook, for herself, the money in the hands of said John H. Kase." It was further found that Kase was not informed of the gift until several weeks after the death of the donor.

The general legal principle regulating the subject of gifts of choses in action has long been established. It is to the effect that with respect to things both tangible and intangible, mere words of donation will not suffice. With regard to the former class — that is, things corporeal — there must be, in addition to the expression of a donative purpose, an actual tradition of the *corpus* of the gift whenever, considering the nature of the property and the circumstances of the actors, such a formality is reasonably practicable. In some instances, when the situation is incompatible with the performance of such ceremony, resort may be had to what has been called a symbolical delivery of the subject.

Touching things in action, as there can be no actual delivery of them, the legal requirement is, that the donor's voucher of

right or title must be surrendered to the donee. Such surrender is deemed equivalent to an actual handing over of things corporeal.

To this extent the law of the subject is neither doubtful nor obscure. The difficulty supervenes as soon as the attempt is made to apply these rules to the ever-variant conditions of the cases that are being presented for judicial examination. Even when the thing given has been a personal chattel, whether certain acts show a purpose to give consummated by a delivery of it, has often been, and doubtless will be, a vexed question. The uncertainty in construing the circumstances is even greater when we have rights of action to deal with. There are a multitude of decisions which demonstrate the embarrassment inherent in this class of cases; but as these decisions, while all acknowledging the rules just indicated, are in truth nothing more than interpretations, respectively, of the facts of the particular case, and as such facts are unlike the juncture now present, it would serve no useful purpose to review or cite them in detail. There is no observed precedent, so far as circumstances are concerned, for the matter now before us. Many of these decisions may be found in the *Encyclopædia of English and American Law*, tit. "Gifts," and any person who will examine this long train of cases will at once perceive that the principal difficulty has been to decide whether the evidence in hand in the given case showed a delivery of the subject of the gift in a legal point of view.

But this was a maze not without its clue, for the cardinal principle as to what constituted a delivery that would legalize a gift was on all sides admitted and was generally applied. The test was this, that the transfer was such that, in conjunction with the donative intention, it completely stripped the donor of his dominion of the thing given, whether that thing was a tangible chattel or a chose in action. The rule does not require that the title of the donee should be formally perfect, although in the earliest decisions this appears to have been indispensable, but now the law is otherwise settled. Thus, the delivery, with donative intention, of non-negotiable notes or bonds affords an apt illustration of the rule in both of its aspects. Such gifts are admittedly valid, although the title of the donee is not ceremoniously perfect, as it wants the finishing touch of a written assignment; but the transaction is validated on the ground that it is possessed of the all-important quality of depriving the donor of all control over the property. After the delivery of

such bond or note, the donor can exercise not a single act of ownership with respect to it; he cannot sue upon it nor collect it, nor regain its possession. And it is this absolute abnegation of power that, in a legal point of view, makes the transaction enforceable.

This is the crucial test, and if it be applied to the case in hand this donation is not to be sustained. The reason is that the donor parted with nothing that was essential to his own dominion over the moneys in question. After she had transferred the slip of paper in question her dominion over her deposits remained plainly intact. The paper was in no sense a voucher of the receipt of the moneys; they could have been collected without its production; nor was it necessary to a suit for their recovery. It is impossible to believe that the parties intended this slip of paper, which contained nothing but a line of figures and an addition of them, as a testimonial showing the transaction to which it immediately appertained. It does not appear how the donor became possessed of this paper, but construed intrinsically it has the appearance of having been used for the temporary purpose of showing the aggregate of the several sums on deposit, and it carries on its face no indication whatever that it was drawn or given as a voucher of the indebtedness of the person making it. The delivery of so insignificant a paper as this cannot, in our opinion, operate to legalize the transaction in question.

*The defendant is entitled to judgment.*¹

¹ If a chose in action is not in the form of a common-law or mercantile specialty, so that there is no document to pass by delivery or deed, a gift of it by the obligee is so far operative as a power of attorney, that the obligor cannot set up the gratuitous character of the assignment against the donee. *Walker v. Bradford Bank*, 12 Q. B. D. 511; *Harding v. Harding*, 17 Q. B. D. 442; [*King v. Miller*, 223 U. S. 505 (assignment to bank for collection)]; *Forsyth v. Ryan*, 17 Colo. App. 511; *Pugh v. Miller*, 126 Ind. 189; *Wardner etc. Co. v. Jack*, 82 Iowa 435; *Hicks v. Steel*, 126 Mich. 408; *Richardson v. Mead*, 27 Barb. 178; *Merrick v. Brainard*, 38 Barb. 574; *Allen v. Brown*, 51 Barb. 86; *Stone v. Frost*, 61 N. Y. 614; *Dawson v. Pogue*, 18 Ore. 94, 96; *Gregorie v. Rourke*, 28 Ore. 275; [*Levins v. Stark*, 57 Ore. 189]; *Buxton v. Barrett*, 14 R. I. 40. [See Dec. Dig., Assignments, 54.] But see, *contra*, Note, Brownlow, 40; *Patterson v. Williams*, Ll. & G. t. Pl. 95; *Hill v. Sheibley*, 64 Ga. 529; *Tallman v. Hoey*, 89 N. Y. 537 (*semble*); *Luther v. Hunter*, 7 N. D. 544.

It seems to be conceded, however, that the donor may revoke the power of attorney. [See Dec. Dig., Assignments, 53-55, 59.] The reason for this concession is not obvious. If warranted, the donor's death should likewise revoke the power of attorney. There are decisions to this effect: *Sewell v. Moxsy*, 2 Sim. N. s. 189; *Re Richardson*, 30 Ch. Div. 396; *Smither v. Smither*,

THE JUDICATURE ACT, 1873, SEC. 25 (6).

Stat. 36 & 37 Vict. c. 66.

ANY absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal *chose* in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or *chose* in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or *chose* in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or *chose* in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or *chose* in

30 Hun 632 (*semble*, reversing s. c. 1 Dem. 399). But there are also decisions to the contrary: *Airey v. Hall*, 3 Sm. & G. 315, 324; *Jones v. Moore*, 102 Ky. 591; *De Caumont v. Bogert*, 36 Hun 382; *Read v. Long*, 4 Yerg. 68. — AMES.

In *Huggins's Est.*, 204 Pa. 167, a gratuitous transfer *inter vivos* by the vendor of a written contract for the sale of land, by delivery of the writing evidencing the contract was held not to be revoked by the death of the donor. But the opposite result was reached where there was no written evidence of the *chose* in action. *Hawn v. Stoler*, 208 Pa. 610 (*mortis causa*). See *Chander v. Chandler*, 62 Ga. 612.

A deposit in a commercial bank has generally been held not gratuitously assignable by delivery of the depositor's pass book. *Re Beak's Est.*, L. R. 13 Eq. 489; *Jones v. Weakley*, 99 Ala. 441; *Thomas v. Lewis*, 89 Va. 1. But see *Stephenson v. King*, 81 Ky. 425, 433; *Murphy v. Bordwell*, 83 Minn. 54.

In *Re Hughes*, 59 L. T. 586, a man on the point of death delivered to his wife an instrument stating that he gave to her his insurance money and certain money on deposit in a commercial bank. The gift was intended to be effective on his death. It was held not valid as a *donatio mortis causa*.

On the general question of gratuitous assignments of *choses* in action, see *Jenks*, Consideration and the Assignment of *Choses* in Action, 16 L. Quar. Rev. 241; *Anson*, Assignment of *Choses* in Action, 17 L. Quar. Rev. 90; *Costigan*, Gifts *Inter Vivos* of *Choses* in Action, 27 L. Quar. Rev. 326; *White v. Tudor*, Leading Cases in Equity, 8 ed., Vol. 1, pp. 93-162, 413-437; Vol. 2, pp. 853-912; *Thornton*, Gifts; *Maitland*, Equity, 68-75.

action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court under and in conformity with the provisions of the Acts for the relief of trustees.

DONALDSON v. DONALDSON.

CHANCERY. 1854.

Kay 711.

VICE-CHANCELLOR SIR W. PAGE WOOD.¹ In this case a question has been raised how far a deed of assignment, executed by Thomas Hudson, and dated the 29th day of June, 1850, by which he voluntarily assigned a large amount of property, consisting of various securities, to trustees upon certain trusts for the benefit of his donees, has been available to pass certain portions of the property included in the deed. The question has arisen between some of the parties claiming under the deed and the Crown, because the property which did not pass by the deed would be liable to probate and legacy duty, as passing by the settlor's will.

With respect to the great bulk of the property comprised in the deed, the counsel for the Crown has conceded, that, as it stood in the funds and other securities in the name of the settlor, and as he has executed a declaration of trust contained in this deed, the relation of trustee and *cestui que trust* has been created, so that this Court will give effect to it. The real question arises with respect to the sum of 29,400*l.* stock, which was standing in the names of the trustees of the settlor's marriage settlement in trust for himself. I do not think that the declaration of trust annexed to the description of this stock in the schedule is material. What I have to consider is, how far an assignment of this kind, of which no notice was given to the trustees in whose names this stock was standing, was effectual to pass the property therein to the trustees of the voluntary deed, so that this Court would hold, as between the donees under that deed and the representatives of the assignor, that the title was complete. For the purposes of this question, it was necessary to consider the case of *Kekewich v. Manning*, 1 De G. M. & G. 176, in which

¹ The statement of facts is omitted.

the other decisions are reviewed and commented on by Lord Justice Knight Bruce, and which seemed to me, if I may use the expression, to stem the current of authority which had begun to set in adversely to these trusts, more especially since the decision in *Edwards v. Jones*, 1 My. & Cr. 226. Ever since that case there has been considerably more difficulty as to how far a voluntary assignment of a chose in action does or does not confer a title on the donee. Looking through the cases, the principle which I gather from them is the same as that on which the Lords Justices seem to have proceeded in *Kekewich v. Manning*, and though that case does not go so far as the present, I still think that this is concluded by it. In all the cases, except *Beatson v. Beatson*, 12 Sim. 291, and particularly in *Ex parte Pye*, it is laid down that, when there is a complete declaration of trust by a party concerning stock or choses in action vested in himself, this Court will enforce it. On the other hand, where there is a contract only, or an imperfect gift, which requires some other act to complete it on the part of the assignor or donor, the Court will not interfere to require anything else to be done by him. The intermediate cases alone are difficult of solution. The question is, in every case, has there been a declaration of trust, or has the assignor performed such acts that the donee can take advantage of them without requiring any further act to be done by the assignor; and, if the title is so far complete that this Court is not called upon to act against the assignor, it will assist the donee in obtaining the property from any person who would be treated as a trustee for him. In *Beatson v. Beatson* alone there was an assignment of an equitable interest in stock, which was vested not in the donor but in a third party, and it was held that the Court would not assist the volunteer. In *Dillon v. Coppin*, 4 My. & Cr. 647, stock standing in the donor's own name was assigned, and there this distinction was taken, which was somewhat nice, but still consistent with *Ellison v. Ellison*, 6 Ves. 656, and the other cases; namely, that, the stock being in the name of the donor himself, and there being no declaration of trust but a mere assignment, which would not pass the stock at all, and the deed shewing an evident intention on the part of the assignor to do some further act, and containing a covenant to perfect the gift, the Court said, we cannot call upon the donor to transfer the stock or complete the gift. But in the case of an assignment of the equitable interest in stock standing in the names of

trustees, the deed of assignment passes the whole equitable interest of the donor, and the donee may go with that deed to the trustees, and say, transfer to me the interest in this sum of stock; and I think that in such a case it would not even be necessary to make the donor a party to a suit to enforce the gift.

Then the question is, whether, notice not having been given to the trustees, the gift could be enforced. As to that, it has been said in some cases, that the gift is complete when no further act is required to be done by the donor or the donee; and that seems to imply a doubt whether, if there were any act to be done by the donee, the gift could be treated as complete. But the assignment has completely passed the interest of the donor. It is true, that, if no notice of it were given to the trustees, they would be justified in transferring the stock to the original *cestui que trust* for whom they held it; and, if they did so, there would be no remedy against them; and it is possible that the donee might not be able to recover the stock; but all that the donee has to do is, at any time he thinks fit, to give notice to the trustees before the stock is transferred; and when he has given such notice, his title is complete: and, unless the donor or his executors actually obtain possession of the fund, the donee does not require the aid of this Court against them. The fact that the trustees are themselves the executors of the donor in this case, I think does not make any difference. As the donor has not obtained possession of the fund, the donees have a right to go to the trustees and require them to transfer the stock, or come to the Court to have that done. The donees require no assistance from the Court against the original assignor, and therefore the assignment is such as the Court will support. That is the principle upon which cases like *Sloane v. Cadogan*, Sugd. Vend. & Pur. p. 1119, 11th edit., proceed, and which Lord Cottenham seems to recognize in *Edwards v. Jones*, where he says, "In *Sloane v. Cadogan* the claim was not against the donor or his representatives for the purpose of making that complete which had been left imperfect, but against the persons who had the legal custody of the fund; and the question was, whether the transaction constituted them trustees for the fund for the *cestui que trusts*." Sir W. Grant came to the conclusion that it did; and the consequence was, that they were bound to account. That case has been considered by Sir Edward Sugden as going a great way; but, upon the principle stated by Sir W.

Grant, it is free from all possible question, for there was no attempt in that case to call in aid the jurisdiction of the Court." In this case, there is no need whatever for the donees to call in aid the jurisdiction of this Court against the original assignor or his representatives. All that they have to do is, to require the trustees who hold the fund to transfer it to them.

This decision goes somewhat beyond all the authorities except *Cadogan v. Sloane*; but I cannot hold that the owner of an equitable interest in a chose in action is not entitled to assign it; and I think that, upon the principle recognized in *Ellison v. Ellison*, 6 Ves. 656, and like cases, I must decide that the equitable interest in this stock was effectually assigned by this deed.¹

In *CHADWICK v. COVELL*, 151 Mass. 190, HOLMES, C. J., said: "We assume for the purposes of our decision, but without expressing an opinion on either question, that what took place between Mrs. Spencer and the plaintiff purported to be a present gift of the trade-marks, and that, if the gift of a trade-mark in gross would have been good if by deed, it would be equally good at common law when made by parol. The old rule was, 'Everything which is not given by delivery of hands, must be passed by deed.' Noy, *Maxims*, 62, c. 33. Fairfax, J., in *Y. B. 21 Hen. VII. 36*, pl. 45. *Shep. Touch.* 229. But the formalities required by the early common law have been broken in upon a good deal, although more in England than in this State. It may be that later forms of property not admitting of delivery, but unknown to the old law or not then the subject of transfer, are free from the restraints of the ancient rule; just as, at Rome, later forms of property could be conveyed without the com-

¹ *Villers v. Beaumont*, 1 Vern. 100; *Ellison v. Ellison*, 6 Ves. 656; *Bentley v. Mackay*, 15 Beav. 12; *Voyle v. Hughes*, 2 Sm. & G. 18; *Lambe v. Orton*, 1 Dr. & Sm. 125; *Gilbert v. Overton*, 2 Hem. & M. 110; *Re Way's Trusts*, 2 D. J. & S. 365; *Nanney v. Morgan*, 37 Ch. D. 346; *Re Lucan*, 45 Ch. D. 470 (*semble*); *Gannon v. White*, 2 Ir. Eq. 207; *Ensign v. Kellogg*, 4 Pick. 1; *Stone v. Hackett*, 12 Gray 227; *Henderson v. Sherman*, 47 Mich. 267; *Tarbox v. Grant*, 56 N. J. Eq. 199; *Johnson v. Williams*, 63 How. Pr. 233; *Ham v. Van Orden*, 84 N. Y. 257; [*Matson v. Abbey*, 141 N. Y. 179 (deed)]; *Heise v. Wells*, 211 N. Y. 1 (deed); *Patton v. Clendenin*, 3 Murph. (N. C.) 68 (*semble*); *Chasteen v. Martin*, 84 N. C. 391, *accord*.

Bridge v. Bridge, 16 Beav. 315 (said in *Re King*, 14 Ch. D. 184, to have been decided on a wrong ground); *Meek v. Kettlewell*, 1 Hare 464, 1 Ph. 342 (said in *Penfold v. Mould*, 4 Eq. 562, and *Sullivan v. Sullivan*, *Brunner* 645, to be in effect overruled), *contra*. — AMES.

paratively archaic ceremonies of mancipation. It may be that even an oral gift of incorporeal personal property would be sustained, although delivery is impossible from the nature of the case. But that question we leave undecided.”¹

ALGER *v.* SCOTT.

COURT OF APPEALS, NEW YORK. 1873.

54 N. Y. 14.

APPEAL from judgment of the General Term of the Supreme Court in the second judicial district, affirming a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover \$233.31 rent for certain premises in the city of Brooklyn, known as No. 13 Cheever Place, from the 1st day of August, 1866, to the fifteenth of November in the same year. As a defence, the defendants alleged that the plaintiff did, on the 16th of August, 1866, assign to one Glover, all the rents then accrued and unpaid, or that might immediately thereafter accrue from the premises, to the extent of \$346.64.

On the trial the defendants proved that on the 16th day of August, 1866, Thomas Alger, the husband of the plaintiff, was indebted to Glover in the sum of \$700, and that on that day the plaintiff drew and delivered to Glover an order upon the defendants to pay Glover \$346.69, directing them to charge the same to her account of rent of house No. 13 Cheever Place. This order was received by defendants and accepted, but was mislaid, and was not found and delivered to Glover until after the commencement of this action. Upon this state of facts, the judge at circuit charged the jury that the plaintiff's order did not operate as an assignment of her claim for the rent to Glover, and that she was entitled to recover the amount for which the action was brought, and the interest, to which charge the defendants excepted. The jury rendered a verdict in favor of the plaintiff for the amount of the rent and interest.

GRAY, C. The cases in this State, from *Peyton v. Hallett* (1 Caines' Cas., 363, 364, 379), down to *Parker v. The City of Syracuse* (31 N. Y., 376, 379), in which an order, payable out of a specified fund, has been held not to be a bill of exchange re-

¹ Property in a trade name or trade-mark cannot be assigned apart from the business which it designates. *Crossman v. Griggs*, 186 Mass. 275.

quiring an acceptance, but an assignment of the fund to the payee to the amount specified in the order, were each of them cases where the drawer had received a consideration for the order, and, for that reason, the order was held to be an assignment of the fund drawn upon to the amount specified in it. This order was not supported by any consideration. Its validity is tested by the same rule it would be if not drawn upon a specified fund, and Glover, by reason of the defendants' refusal to accept it, had brought his action against the plaintiff to recover its amount. In such a case, the want of consideration would defeat, as it rightfully did in this case.

The judgment appealed from should be affirmed.

All concur for affirmance, except EARL, C.,¹ dissenting.

LOTT, Ch. C., not sitting.

*Judgment affirmed.*²

In re ELLENBOROUGH.

TOWRY LAW *v.* BURNE.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1903.

[1903] 1 Ch. 697.

THIS was an originating summons taken out by the Hon. Emily Julia Towry Law in the matter of the estate of the late Lord Ellenborough and of a settlement dated December 22, 1893.

The settlement in question was a voluntary settlement by deed, executed by Miss E. J. Towry Law, by which she granted to trustees the real estate and assigned the personal estate to which she, in the event of the deaths of her brother and sister respectively in her lifetime, might become entitled under their respective wills or intestacies. At that time she had no property in the real or personal estate of her brother or sister, but she had an expectation that, owing to the state of their health, she might become entitled to their property. The sister died in 1895, and the settlor, Miss E. J. Towry Law, became entitled to and received a share of her estate, and handed it over to the trustees. The brother, Lord Ellenborough, died in 1902. Miss

¹ The dissenting opinion of Earl, C., is omitted.

² *Cf. Re Lucan*, 45 Ch. D. 470 (gratuitous equitable charge by deed held invalid).

E. J. Towry Law became entitled to all his property; this she did not desire to transfer to the trustees, and she took out a summons to decide the question whether she could refuse to do so.

Asbury, K. C., and Cordery, for the applicant. At the time when Miss E. J. Towry Law executed the settlement she had no interest in her brother's and sister's estates: she had only a *spes successionis*. There was nothing in existence which she could assign; there was nothing which by s. 6 of the Real Property Act, 1845 (8 & 9 Vict. c. 106), was made assignable by deed. The settlement was, therefore, not a conveyance of any property, and the question is whether it operated as a covenant to convey. No doubt if it were for value it could be enforced in that way: *Fearne on Contingent Remainders*, 9th ed. p. 548. But it has been held by Wigram V.-C. in *Meek v. Kettlewell*, 1 Hare, 464; and by Lord Lyndhurst, L. C. in the same case on appeal, 1 Ph. 342, that a voluntary assignment of an expectancy, even though under seal, will not be enforced by a Court of Equity. It is stated in *White and Tudor's Leading Cases in Equity*, 7th ed. vol. ii. pp. 850, 851, that that decision was overruled by *Kekewich v. Manning*, 1 D. M. & G. 176; but we submit that that is a mistake. In *Kekewich v. Manning*, 1 D. M. & G. 176, there was an assignment of property, not of an expectancy; the alienation was complete; and the settlement was only in part voluntary. This view is supported by *Re Tilt*, 74 L. T. 163, although the point was not argued, and *In re Parsons*, 45 Ch. D. 51, 57, 58.

Buckmaster, K. C., and W. G. Wrangham, for the trustees of the settlement. It is said that equity will not assist a volunteer, and that, as the trustees cannot without the assistance of a Court of Equity compel the plaintiff to transfer the property to them, she must succeed on this application. But it must be conceded that if it is not necessary for them to apply to the Court they are entitled to enforce payment; and that depends upon the question whether this settlement operated as an assignment. For that purpose the question whether it was for value is immaterial. If there was an assignment, it did not fail to operate simply because there was no consideration. In this settlement there was an assignment of a future interest which passed the property: *Tailby v. Official Receiver*, 13 App. Cas. 523, 543, 546. That shews that the trustees do not require the assistance of a Court of Equity. If this property were in

the hands, not of the plaintiff, but of somebody else, the trustees could sue for it as assignees. Any claim against the property ought to be made on them, not on the plaintiff: *Kekewich v. Manning*, 1 D. M. & G. 176. Nothing remains to be done by the plaintiff to complete the transfer to us of her interest in the property.

Cur. adv. vult.

Jan. 28. BUCKLEY, J. On December 22, 1893, there were living Charles, Lord Ellenborough, and Gertrude Edith Towry Law, brother and sister of the applicant upon this summons. They were entitled respectively to certain property absolutely. In their property the applicant had no property or interest of any kind. She had an expectation arising from the fact that, owing to the relationship between them and herself and to their state of health, she might be (as was subsequently the case) the survivor, and might under their respective wills or intestacies become entitled to their property. She had neither a future interest nor a possibility coupled with an interest capable of being disposed of under s. 6 of 8 & 9 Vict. c. 106. She had only a *spes successionis*, and that is not a title to property by English law: *In re Parsons*. In that state of facts the applicant, on December 22, 1893, executed a voluntary settlement by deed by which she granted to the trustees, who are the respondents on this summons, the real estate, and assigned the personal estate to which the applicant, in the event of the death of her brother and sister respectively in her lifetime, might become entitled under their respective wills or intestacies. That deed could not operate by way of grant, but could in a Court of Equity operate as an agreement on the part of the applicant to grant and assign that which in fact could not by the deed be granted or assigned. The brother and sister are now dead, intestate, and the applicant has become entitled by devolution. The property coming to the applicant from her sister has been handed over to the trustees, and the applicant does not say that she can get it back. The property of the brother has not so been handed over, and the applicant does not desire to hand it over unless she is compelled to do so. The question to be determined upon this summons is whether she can be called upon by the trustees to assign and hand over to them that which has come to her by devolution from the late Lord Ellenborough, or whether she can refuse to do anything further to perfect that which was a mere voluntary deed. In

order to raise the question in proper form a writ has been, or will be, issued by the trustees against the applicant seeking to recover the funds, and the order will be drawn up on this summons and in that action. The deed was purely voluntary. The question is whether a volunteer can enforce a contract made by deed to dispose of an expectancy. It cannot be and is not disputed that if the deed had been for value the trustees could have enforced it. If value be given, it is immaterial what is the form of assurance by which the disposition is made, or whether the subject of the disposition is capable of being thereby disposed of or not. An assignment for value binds the conscience of the assignor. A Court of Equity as against him will compel him to do that which *ex hypothesi* he has not yet effectually done. Future property, possibilities, and expectancies are all assignable in equity for value: *Tailby v. Official Receiver*. But when the assurance is not for value, a Court of Equity will not assist a volunteer. In *Meek v. Kettlewell*, affirmed by Lord Lyndhurst, the exact point arose which I have here to decide, and it was held that a voluntary assignment of an expectancy, even though under seal, would not be enforced by a Court of Equity. "The assignment of an expectancy," says Lord Lyndhurst, "such as this is, cannot be supported unless made for a valuable consideration." It is however suggested that that decision was overruled or affected by the decision of the Court of Appeal in *Kekewich v. Manning*, and a passage in *White and Tudor's Leading Cases in Equity*, 7th ed. vol. ii. p. 851, was referred to upon the point. In my opinion *Kekewich v. Manning* has no bearing upon that which was decided in *Meek v. Kettlewell*. The assignment in *Kekewich v. Manning* was not of an expectancy, but of property. "It is on legal and equitable principles," said Knight Bruce, L. J., "we apprehend, clear that a person *sui juris*, acting freely, fairly, and with sufficient knowledge, ought to have and has it in his power to make, in a binding and effectual manner, a voluntary gift of any part of his property, whether capable or incapable of manual delivery, whether in possession or reversionary, and howsoever circumstanced." The important words there are "of his property." The point of *Meek v. Kettlewell* and of the case before me is that the assignment was not of property, but of a mere expectancy. On December 22, 1893, that with which the grantor was dealing was not her property in any sense. She had nothing more than an expectancy. In

Re Tilt there was again a voluntary assignment of an expectancy, and the point was not regarded as arguable. "It was rightly admitted," said Chitty, J., "that as, when this plaintiff executed the deed of 1880, she had no interest whatever in the fund in question, which was a mere expectancy, the deed was wholly inoperative both at law and in equity, being entirely voluntary." By "wholly inoperative" there the learned judge of course did not mean that if the voluntary settlor had handed over the funds the trustees would not have held them upon the trusts, but that the grantees under the deed could not enforce it as against the settlor in a Court of Equity or elsewhere. In my judgment the interest of the plaintiff as sole heiress-at-law and next of kin of the late Lord Ellenborough was not effectually assigned to the trustees by the deed, and the trustees cannot call upon her to grant, assign, transfer, or pay over to them his residuary real and personal estate.¹

In re LEAPER.

BLYTHE *v.* ATKINSON.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1916.

[1916] 1 Ch. 579.

WILLIAM LEAPER on December 9, 1914, having made and signed two promissory notes, expressed to be "for value received," gave one to Sarah Letitia Thompson, being for 100*l.* and interest at 4*l.* per cent. and payable on demand to her, and the other to Mary Thompson, being for 130*l.* and interest at 4*l.* per cent. and payable on demand to her or her order.

When the notes were given Leaper was suffering from a painful and incurable malady, and, as his Lordship found, must have known that there was no prospect of recovery, although on his part there was no imminent expectation of death.

¹ *Lenning's Est.*, 182 Pa. 485, *accord.*

An assignment by an heir of his expectancy even if made for value is invalid if it is a hard bargain. In a few jurisdictions it has been held invalid unless communicated to the ancestor. *McClure v. Raben*, 133 Ind. 507 (but see *McAdams v. Bailey*, 169 Ind. 518); *McCall v. Hampton*, 98 Ky. 166; *Boynton v. Hubbard*, 7 Mass. 112. But the weight of authority is the other way. See *Hale v. Hollon*, 90 Tex. 427; 33 L. R. A. 266; 56 Am. St. Rep. 339.

As to the nature and effect of an assignment for value of an expectancy, see *Re Lind*, [1915] 2 Ch. 345; *Bridge v. Kedon*, 163 Cal. 493, 43 L. R. A. (N. S.) 404; Dec. Dig., Assignments, 6-9.

The notes were not presented for payment before the testator's death, which took place on February 21, 1915, but after the death the donees of the notes presented the notes to Leaper's executors and claimed payment of the amounts thereof.

Leaper's executors took out an originating summons, to which the two donees of the notes, the residuary legatees under Leaper's will, and other persons were defendants, raising (*inter alia*) the question whether the plaintiffs, as executors, might properly pay out of their estate, as debts, or gifts *mortis causa*, or otherwise, to the defendants S. L. Thompson and Mary Thompson the amounts of the two notes given to them, with interest.

SARGANT, J. (after referring to the evidence). Now two questions arise with regard to this matter. The first is whether the gift of the promissory note in either case constituted a *donatio mortis causa* in the sense that the testator — as I will call him — was making a gift which was intended to be effectual only in the event of his death, or whether he was making an out-and-out gift. The second question is whether the testator's own promissory note could be a proper subject of a *donatio mortis causa*.

As regards the first question, I have come to the conclusion, in all the circumstances of the case, that the testator was intending to make these ladies an out-and-out gift, and not a gift conditional on his death. [His Lordship referred to the evidence and continued:] In my view, all the circumstances tend to show that he was intending to benefit these ladies to a greater and more immediate extent than would have been the case if he had merely been making a *donatio mortis causa*; and, that being so, the very fact that he intended to give them more has unfortunately resulted in his not giving them anything.

The second point is one of general law, and I will say something about it, although it is not strictly necessary to decide it in view of the conclusion to which I have already come. On the whole, I think that the better view is that a donor's own promissory note is not a proper subject of a *donatio mortis causa*. The matter is dealt with by Buckley, J., in *In re Beaumont*, [1902] 1 Ch. 894, where he says: "In all the cases, in order that the gift may be valid, it must I think be shown that the donor handed over either property, or the *indicia* of title to property, which belonged to him. His own cheque is not property; it is only a revocable order such that if the banker acts on it the donee will have the money to which it relates." And I can find

no instance whatever in the books of a gift of either a donor's own promissory note, or a donor's own cheque held uncashed, being held to be effective as a *donatio mortis causa*, except in *Bromley v. Brunton*, L. R. 6 Eq. 275, a decision of Stuart V.-C., which, as explained by Buckley, J., in *In re Beaumont*, [1902] 1 Ch. 895, is not really an authority at all for the view that the gift of a donor's own cheque is in itself sufficient.

If the donor is giving somebody else's promissory note, he is then handing over the *indicia* of title to a species of property belonging to the donor. If he is handing over his own promissory note or cheque — particularly in the former case — he seems to me to be doing something quite different. The note, while in the donor's hands, is not property. And, by handing it to the donee, he is not transferring or attempting to transfer property, but is merely making an attempt — in itself imperfect — to create a general liability against himself, or rather against his estate. It may be that to deprive the executors of the donor in such a case of the right to plead want of consideration is no greater interference than to compel them in the ordinary case to perfect an imperfect transfer. But it is a different interference, and its adoption would, I think, involve the creation of a new class of *donationes mortis causa*.

Further, there is a dictum of Abbott, C. J., in *Holliday v. Atkinson*, 5 B. & C. 501, 503, directly to the effect that a person's own promissory note is not a proper subject of a *donatio mortis causa*, and the remarks of Bowen, L. J., in *In re Hughes*, 59 L. T. 586, 587, are to the same effect. In view of these expressions and of the judgment of Buckley, J., in *In re Beaumont*, [1902] 1 Ch. 889, I think that, at any rate in a Court of first instance, it is impossible to hold that a gift either of a donor's own cheque, which is uncashed, or of a donor's own promissory note, can be effectual as a *donatio mortis causa*.

Unfortunately, therefore, I must decide against the claimants on both the two grounds which I have stated.¹

¹ See *Parish v. Stone*, 14 Pick. (Mass.) 198; *Sanborn v. Sanborn*, 65 N. H. 172; *Executors of Egerton v. Egerton*, 17 N. J. Eq. 419; *Starr v. Starr*, 9 Oh. St. 74. And see 7 L. R. A. (N. S.) 156; Ann. Cas. 1914C 1139.

If the note is paid by the donor the gift is of course complete. So also if the donee negotiates the note before the donor's death or revocation, he may keep the proceeds. *Armstrong v. Armstrong*, 142 Ill. App. 507.

SIMMONS v. THE CINCINNATI SAVINGS
SOCIETY.

SUPREME COURT, OHIO. 1877.

31 Oh. St. 457.

MOTION for leave to file a petition in error to reverse the judgment of the Superior Court of Cincinnati.

Rhoda Wylie, the mother of the plaintiff, had three hundred dollars on deposit with the defendant. The mother was living with the plaintiff, and while lying sick she sought to give this money to the plaintiff. To effect this object, the plaintiff, about two weeks before her mother's death, went to the defendant's place of business, and told its officers that her mother intended to give her this money, whereupon she was given by them a blank check to be filled up and signed by Mrs. Wylie, and told at the same time that the check would be honored on presentation, and she could draw the money or reinvest it in her own name. On the 15th of September, 1875, the blank check was filled up for the three hundred dollars, and Mrs. Wylie signed and delivered it to the plaintiff. Mrs. Wylie died before the check was presented to the defendant. Before it was presented, and before the defendant knew it had been given to the plaintiff, D. Wylie, a brother of the plaintiff, was duly appointed administrator of the deceased. He notified the defendant of his appointment, and directed it not to pay the check. Two days afterward, the plaintiff presented the check, and demanded payment, which was refused on the ground of the drawer's decease, and of the direction from the administrator not to pay the check. The money was afterward paid to the administrator, and the plaintiff then instituted this suit.

The court in its charge told the jury that if the check was a gift to the plaintiff, and without consideration, it would be proper for them to take into consideration, in making up their verdict, whether the administrator, by notifying the defendant not to pay the check, did not revoke the gift; that if the check was a gift, the maker had the right to revoke it at any time before the subject of the gift had passed into the actual possession of the plaintiff, and that the administrator had the same right.

The verdict and judgment were for the defendant.

On error, this judgment was affirmed in general term; and the object of the present proceeding is to obtain the reversal of these judgments.

WHITE, C. J. We find no error in this case to the prejudice of the plaintiff.

The question as to what are the rights of the holder of a check for value, against the drawee or drawer, does not arise in this case. Many of the authorities cited by counsel for the plaintiff, relate to this question and need not here be considered.

The plaintiff claims as the payee of a check delivered to her by the drawer, who intended thereby to transfer to the plaintiff, by way of gift, the fund on which the check was drawn; and the question is whether before the payment or acceptance of the check by the drawee, the gift was executed.

It seems clear to us that until the check was either paid or accepted the gift was incomplete; and that in the absence of such payment or acceptance, the death of the drawer operated as a revocation of the check.

It is well settled that, in order to constitute a valid gift, there must be a complete delivery of the subject of the gift, either actual or constructive.

The check in the present instance was a mere order or authority to the payee to draw the money; and being without consideration, it was subject to be countermanded or revoked while it remained unacted on in the hands of the payee.

This conclusion is fully supported by authority. *Hewitt v. Kaye*, L. R., 6 Eq., C. 198; *The Second National Bank of Detroit v. Williams*, 13 Mich. 282; 1 Parsons on Con. *235, *236; *Bayles on Bills* (6th Am. ed. by Sharswood), *25.

*Leave refused.*¹

¹ By the great weight of authority, a check is not an assignment in whole or *pro tanto* of the drawer's claim against the bank. *Hopkinson v. Forster*, L. R. 19 Eq. 74; *Florence Mining Co. v. Brown*, 124 U. S. 385; *Bullard v. Randall*, 1 Gray (Mass.) 605; *First Nat. Bk. v. Clark*, 134 N. Y. 368; 2 Ames, Cas. Bills and Notes, 735n.; *Brady, Bank Checks*, secs. 5, 6; *Dec. Dig., Assignments*, 49. Although several states, notably Illinois (*Gage Hotel Co. v. Union Nat. Bk.*, 171 Ill. 531), formerly held the other way, the rule was changed in those states by the Negotiable Instruments Law, sec. 189 ("A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.") In spite of this provision, however, it is of course possible for the depositor to assign his claim against the bank. *Hove v. Stanhope State Bank*, 138 Iowa 39.

As to the effect of a gift of the donor's own check, see *Tate v. Hilbert*, 2

part of the interest or dividends of the said sum of 60,000*l.* unto or for the maintenance or education of the said John and Jacob during their minorities, with power to raise and apply sums, not exceeding 10,000*l.* each, for their preferment or advancement. And it was further agreed and declared, that, after the decease of the said Ellis Fletcher, the trustees or trustee for the time being, until the said trust monies should vest absolutely in some person or persons, under the trusts thereinbefore expressed, should receive and accumulate the interest, dividends, and annual produce thereof, or so much thereof as should be unapplied and undisposed of under the said trusts; and that the said interest, dividends, and accumulations should belong to and be in trust for the person or persons who, under the trusts thereinbefore declared, should ultimately become entitled to the fund or funds from which such accumulations should have proceeded. And the deed contained the usual clauses enabling the trustees to give receipts and for indemnifying them.

The testator, by his will, dated the 11th of January, 1834, after revoking all previous testamentary dispositions which he might have made, gave and devised all his real and personal estate to the trustees and executors therein named, upon certain trusts, for the benefit of his wife, his said sons John and Jacob, and his three legitimate children, who were infants.

The testator died on the 26th of April, 1834. John, one of his said sons, died in 1836, an infant. The plaintiff, Jacob, the other son, attained twenty-one, in September, 1843.

The plaintiff, by his bill, claimed to have become solely entitled to the 60,000*l.* and interest, under the indenture of covenant of September, 1829, upon the death of John, his brother, under twenty-one; and the bill prayed that the said indenture might, if necessary, be established; and that it might be declared that by virtue thereof the plaintiff was entitled to have the sum of 60,000*l.* and interest, in addition to any benefit given to him by the testator's will; and that the defendants, the executors, might be decreed to pay to the plaintiff what should be due to him in respect of the same.

The executors admitted assets. The surviving trustees named in the indenture of covenant of September, 1829, by their answer, said, that they had not accepted or acted in the trusts of the indenture; and they declined to accept or act in such trusts, unless the Court should be of opinion that they were bound so to act; they also declined to take proceedings either

at law or in equity, or to permit their names to be used for the purpose of recovering the said sum of 60,000*l.*, except under the order and upon being indemnified by the decree of the Court; and they declined to receive the said sum, or to hold it upon the trusts of the indenture unless under such decree; but they stated that they were willing to act as the Court should direct.

VICE-CHANCELLOR [SIR JAMES WIGRAM]. It is not denied, that if the plaintiff in this case had brought an action in the name of the trustees, he might have recovered the money; and it is not suggested, that if the trustees had simply allowed their name to be used in the action, their conduct could have been impeached. There are two classes of cases, one of which is in favour of, and the other, if applicable, against, the plaintiff's claim. The question is, to which of the two classes it belongs.

In trying the equitable question, I shall assume the validity of the instrument at law. If there was any doubt of that, it would be reasonable to allow the plaintiff to try the right by suing in the name of the surviving trustee. The first proposition relied upon against the claim in equity was, that equity will not interfere in favour of a volunteer. That proposition, though true in many cases, has been too largely stated. A court of equity, for example, will not, in favour of a volunteer, enforce the performance of a contract in specie. That it will, however, sometimes act in favour of a volunteer, is proved by the common case of a volunteer on a bond who may prove his bond against the assets. Again, where the relation of trustee and cestui que trust is constituted, as where property is transferred from the author of the trust into the name of a trustee, so that he has lost all power of disposition over it, and the transaction is complete as regards him, the trustee, having accepted the trust, cannot say he holds it, except for the purposes of the trust; and the Court will enforce the trust at the suit of a volunteer. According to the authorities, I cannot, I admit, do anything to perfect the liability of the author of the trust, if it is not already perfect. This covenant, however, is already perfect. The covenantor is liable at law, and the Court is not called upon to do any act to perfect it. One question made in argument has been, whether there can be a trust of a covenant the benefit of which shall belong to a third party; but I cannot think there is any difficulty in that. Suppose, in the case of a personal covenant to pay a certain annual sum for the benefit of a third per-

son, the trustee were to bring an action against the covenantor; would he be afterwards allowed to say he was not a trustee? If he cannot do so after once acknowledging the trust, then there is a case in which there is a trust of a covenant for another. In the case of *Clough v. Lambert*, 10 Sim. 174, the question arose; the point does not appear to have been taken during the argument, but the Vice-Chancellor of England was of opinion that the covenant bound the party; that the cestui que trust was entitled to the benefit of it; and that the mere intervention of a trustee made no difference. The proposition, therefore, that in no case can there be a trust of a covenant, is clearly too large, and the real question is, whether the relation of trustee and cestui que trust is established in the present case.

There is another class of cases: — *Brackenbury v. Brackenbury*, 2 J. & W. 391, *Cecil v. Batcher*, Id. 565, and others, in which it was doubted whether, if the author of a voluntary deed retains it in his possession, the Court will interfere in favour of the volunteer to have it delivered up; but these are cases which I think hardly affect the present question.

It was then said that this was an agreement by A. and B. for the benefit of C., a stranger to both; and, that, according to the cases, of which *Colyear v. Lady Mulgrave*, 2 Keen, 81, is an example, C., the stranger, could not enforce the agreement. But where the transaction is of such a nature that there is no doubt of the intention of A., while dealing with his own property, to constitute B. a trustee for C., and B. has accepted the trust, may not C. be in a condition to compel B. to enforce the legal right which the trust-deed confers upon him? If the trustees have in this case accepted the trust, I think the decision in *Clough v. Lambert* applies; and if they have not accepted the trust, I scarcely think that fact can make a difference. It is an extraordinary proposition, that nothing being wanted to perfect the liability of the estate to pay the debt, the plaintiff has no right in equity to obtain the benefit of the trust.

VICE-CHANCELLOR. The objections made to the relief sought by the plaintiff under the covenant in the trust-deed of September, 1829, were three: first, that the covenant was voluntary; secondly, that it was executory; and, thirdly, that it was testamentary, and had not been proved as a will. For the purpose of considering these objections I shall first assume, that the surviving trustee of the deed of September, 1829, might recover upon the covenant at law; and upon that assumption the only

questions will be, first, whether I shall assist the plaintiff in this suit so far as to allow him the use of the name of the surviving trustee, upon the latter being indemnified, a course which the trustee does not object to if the Court shall direct it; and, secondly, whether I shall further facilitate the plaintiff's proceeding at law by ordering the production of the deed of covenant for the purposes of the trial.

Now, with regard to the first objection, for the reasons which I mentioned at the close of the argument, I think the proposition insisted upon, that because the covenant was voluntary, therefore the plaintiff could not recover in equity, was too broadly stated. I referred to the case of a volunteer by specialty claiming payment out of assets, and to the case of one claiming under a voluntary trust, where a fund has been transferred. The rule against relief to volunteers cannot, I conceive, in a case like that before me, be stated higher than this, — that a court of equity will not, in favour of a volunteer, give to a deed any effect beyond what the law will give to it. But if the author of the deed has subjected himself to a liability at law, and the legal liability comes regularly to be enforced in equity, as in the cases before referred to, the observation that the claimant is a volunteer is of no value in favour of those who represent the author of the deed. If, therefore, the plaintiff himself were the covenantee, so that he could bring the action in his own name, it follows, from what I have said, that, in my opinion, he might enforce payment out of the assets of the covenantor in this case. Then, does the interposition of the trustees of this covenant make any difference? I think it does not. Upon this part of the case I have asked myself the question proposed by Vice-Chancellor Knight Bruce, in *Davenport v. Bishopp*, 2 Y. & C. C. C. 451, whether, if the surviving trustee chose to sue, there would be any equity on the part of the estate to restrain him from doing so; or, which is the same question, in principle, whether, in a case in which the author of the deed has conferred no discretion on the trustees (upon which supposition the estate is liable at law) the right of the plaintiff is to depend upon the caprice of the trustee, and to be kept in suspense until the Statute of Limitations might become a bar to an action by the trustee? Or, in the case of new trustees being appointed, (perhaps by the plaintiff himself, there being a power to appoint new trustees) supposing his own nominees to be willing to sue, the other trustees might refuse to sue? I think the answer to

these and like questions must be in the negative. The testator has bound himself absolutely. There is a debt created and existing. I give no assistance against the testator. I only deal with him as he has dealt by himself, and if in such a case the trustee will not sue without the sanction of the Court, I think it is right to allow the *cestui que* trust to sue for himself, in the name of the trustee, either at law, or in this court, as the case may require. The rights of the parties cannot depend upon mere accident and caprice. Having come to this conclusion upon abstract reasoning, it was satisfactory to me to find, that this view of the case is not only consistent with, but is supported by, the cases of *Clough v. Lambert*, 10 Sim. 174, and *Williamson v. Codrington*, 1 Ves. sen. 511. If the case, therefore, depended simply upon the covenant being voluntary, my opinion is, that the plaintiff would be entitled to use the name of the trustee at law, or to recover the money in this court, if it were unnecessary to have the right decided at law, and, where the legal right is clear, to have the use of the deed, if that use is material.

The second question is, whether, taking the covenant to be executory, the title of the plaintiff to relief is affected by that circumstance? The question is answered by what I have already said. Its being executory makes no difference, whether the party seeks to recover at law in the name of the trustee, or against the assets in this court.

The third question is, whether the plaintiff is precluded from relief in this court, on the ground suggested, that this is a testamentary paper. I may observe, that this objection goes also to the right to sue at law — a right which I have assumed in the observations I have already made. I have read the cases cited by Mr. Follett, as to the instrument being testamentary, and I have also referred to many other cases upon the same point. See 1 *Williams Tr. on Executors*, p. 75, ed. 3. I certainly was not prepared to find that the cases had gone so far as they have upon the subject. Those cases, however, are very distinguishable from the one before me. This is not a case where there is a general power of revocation reserved — a general power to dispose by will notwithstanding the execution of the instrument. In the cases referred to there has been a general reservation — or something like a reservation — of the party's right to deal with the property, notwithstanding the instrument; and the courts have held, that in such cases the instrument

being one which was not to have effect until the death of the party — or rather, I would say, to use the language of Sir John Nicholl in one of the cases in which, until the death of the party, the instrument itself was not consummated — until then no conclusive effect could be given to it. If that does not occur, the instrument is not to be considered as testamentary. In this case the party clearly was bound, and there is, therefore, no ground for the argument that the interest is testamentary.

The only other question arises from the circumstance of the instrument having been kept in the possession of the party, — does that affect its legal validity? In the case of *Dillon v. Coppin*, (see 4 Myl. & Cr. 660), I had occasion to consider that subject, and I took pains to collect the cases upon it. The case of *Doe v. Knight* (*Doe d. Garnons v. Knight*, 5 B. & C. 671) shews, that if an instrument is sealed and delivered, the retainer of it by the party in his possession does not prevent it from taking effect. No doubt the intention of the parties is often disappointed by holding them to be bound by deeds which they have kept back, but such unquestionably is the law.

As to taking the deed out of the possession of the trustees of the testator's will, I was referred to *Cecil v. Butcher*, 2 J. & W. 565, and *Brackenbury v. Brackenbury*, Id. 391, where a doubt is suggested, whether the Court would take the deed out of the possession of the party. The doubt in those cases was founded on the fact, that the instrument was for illegal purposes, concerted by both parties; but, where the instrument is free from all objection in that respect, the cases are clear that such instrument is binding at law, and, if binding, it ought to be produced. Unless, therefore, there is some reason for trying the case at law, I think the decree must be for payment upon the admission of assets.

Declare that the deed of the 1st September, 1829, constitutes a debt at law, and decree payment of the principal and interest on the same to the plaintiff out of the assets of the testator, deducting thereout as in part payment thereof any sums which have been applied for his maintenance during his minority.¹

¹ See *Gordon v. Small*, 53 Md. 550; *Fogg v. Middleton*, 2 Hill Ch. (S. C.) 451, *ante* p. 97; *Lewin, Trusts*, 86n (e).

In *Landon v. Hutton*, 50 N. J. Eq. 500, it was held that where A gratuitously credits B in trust for C, no debt is created and consequently no trust arises; nor is meritorious consideration in such case sufficient to create a valid debt.

On the question of the invalidity of a trust on the ground that it is a testamentary disposition made without proper formalities, see Chap. II, sec. IV, *post*.

EXTINGUISHMENT OF A CHOSE IN ACTION. A creditor may gratuitously extinguish his claim, either by a release under seal or, in the case of a common law or mercantile specialty, by a surrender or destruction of the instrument of obligation. *Denunzio v. Scholtz*, 117 Ky. 182. But a parol forgiveness of a debt is inoperative both in equity and at law. *Ames*, 128n. See also *Edwards v. Walters*, [1896] 2 Ch. 157, 168, 170; *Buswell v. Fuller*, 156 Mass. 309; *Trombly v. Klersy*, 139 Mich. 209; *Landon v. Hutton*, 50 N. J. Eq. 500; *Schiehl's Est.*, 179 Pa. 308, 318; *Collyer & Co. v. Moulton*, 9 R. I. 90 (*semble*). In some states however it is held that a written receipt is sufficient where surrender is impossible. *Green v. Langdon*, 28 Mich. 221; *Gray v. Barton*, 55 N. Y. 68; *McKenzie v. Harrison*, 120 N. Y. 260. See *Re Alstyne*, 207 N. Y. 298; *Hall v. O'Brien*, 218 N. Y. 50.

It would seem however that, under the doctrine of *Ex parte Pye*, a creditor may gratuitously and by parol declare himself trustee for his debtor. The effect of such a declaration would be to give the debtor an equitable defense to the claim. See *Flower v. Marten*, 2 Myl. & C. 459. But see *Cross v. Sprigg*, 6 Hare 552.

SECTION III.

The Statute of Frauds.

THE STATUTE OF FRAUDS.

29 Chas. II. c. 3 (1676).

VII. And be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June [1677] all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

VIII. Provided always, That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if

this statute had not been made; anything hereinbefore contained to the contrary notwithstanding.

IX. And be it further enacted, That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be wholly void and of none effect.¹

¹ The seventh section of the English Statute of Frauds has been adopted in many states with substantially the same phraseology. In some states the Statute provides that trusts of land must be "created or declared" in writing or by deed or conveyance in writing.

In the following states there is no statute making a writing essential to the validity of a trust: Arizona, Connecticut, Delaware, Kentucky, New Mexico, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Virginia, West Virginia, Wyoming. In most of these states there would seem to be no objection to oral trusts of land. Ames, 177. But in some of them it is held that the spirit of the provisions requiring a writing in the case of conveyances of and contracts concerning interests in land, forbids oral trusts of land. In Connecticut and Kentucky the courts have held that a writing is essential to the validity of a trust of land. *Dean v. Dean*, 6 Conn. 285; *Verzier v. Convard*, 75 Conn. 1; *Wilson v. Warner*, 84 Conn. 560; *Chiles v. Woodson*, 2 Bibb (Ky.) 71; *Parker's Heirs v. Bodley*, 4 Bibb (Ky.) 102; *Graves v. Dugan*, 6 Dana (Ky.) 331, 332; *Vizard Inv. Co. v. York*, 167 Ky. 634; *Doom v. Brown*, 171 Ky. 469. In North Carolina and Texas a trust created on a transfer is valid though oral. *Shelton v. Shelton*, 5 Jones Eq. (N. C.) 292; *Riggs v. Swann*, 6 Jones Eq. (N. C.) 118; *Leggett v. Leggett*, 88 N. C. 108; *Mead v. Randolph*, 8 Tex. 191, 198; *Fretelliere v. Hindes*, 57 Tex. 392. But if the owner of land orally declares himself trustee, the trust is unenforceable. *Frey v. Ramsour*, 66 N. C. 466; *Pittman v. Pittman*, 107 N. C. 159; *Allen v. Allen*, 101 Tex. 362. See 61 Univ. Pa. L. Rev. 687. In West Virginia an oral trust is valid if in favor of a third person (*Hardman v. Orr*, 5 W. Va. 71; *Nease v. Capehart*, 8 W. Va. 95, 109; *Troll v. Carter*, 15 W. Va. 567, 578; *Zane v. Fink*, 18 W. Va. 693, 755; *Titchenell v. Jackson*, 26 W. Va. 460); but invalid if in favor of the grantor. *Pusey v. Gardner*, 21 W. Va. 469; *Cain v. Cox*, 23 W. Va. 594; *Crawford v. Workman*, 64 W. Va. 19, 20.

In the following cases it was held that the parol evidence rule forbade engrafting a trust upon a conveyance made by a deed absolute on its face: *Kelly v. McNeill*, 118 N. C. 349; *Gaylord v. Gaylord*, 150 N. C. 222; *Walters v. Walters*, 172 N. C. 328. But see *contra*, *Minchin v. Minchin*, 157 Mass. 265 (personalty); *Harvey v. Gardner*, 41 Oh. St. 642; *Russell v. Bruer*, 64 Oh. St. 1; *Mee v. Mee*, 113 Tenn. 454 (*semble*); *Young v. Brown*, 136 Tenn. 184; *Young v. Holland*, 117 Va. 433.

Where the deed affirmatively negatives any trust, parol evidence of the intention to create a trust is inadmissible. *Mee v. Mee*, 113 Tenn. 454. And when an express trust is declared, a different trust cannot be shown by parol evidence. *Earl of Worcester v. Finch*, 4 Inst. 85, 86; *Walton v. Follansbee*, 165 Ill. 480; *Supreme Lodge v. Rutzler*, 87 N. J. Eq. 342.

As to the effect of part performance, see *Feeney v. Howard*, 79 Cal. 525;

DANSER *v.* WARWICK.

CHANCERY, NEW JERSEY. 1880.

33 N. J. Eq. 133.

THE VICE-CHANCELLOR [VAN FLEET]. The complainant is the widow of David C. Danser. She seeks to have a parol trust established and enforced against the defendant. She alleges that her husband, some months before his death, assigned the bond and mortgage in controversy to the defendant, upon a parol trust or understanding that he would forthwith, or by a short day, transfer them to her. The transfer to the defendant was intended to be merely a step in vesting her with title. The assignment to the defendant bears date February 1st, 1875, and Danser died on the 13th day of the following September. The bond and mortgage were in Danser's possession at the time of his death, and have since then been constantly in the possession of the complainant. The defendant has never asked for them, nor attempted to get possession of them. A month or six weeks prior to Danser's death, the defendant directed an assignment to be drawn to the complainant, stating to the person to whom he gave the direction that he must draw it for Danser, who would pay him. He, at the same time, said it was right that the old lady — referring to the complainant — should have the bond and mortgage. Danser, at this time, was prostrated by the disease which shortly afterwards caused his death. The defendant did not remain to execute the assignment, but said he would return soon and do so. He did not return that day. He was subsequently informed, on two or three different occasions, while Danser was living, that the assignment had been drawn and was ready for execution. On each occasion he said he had forgotten or neglected to execute it, but would call soon and do so. He never fulfilled his promise. Two or three weeks after Danser's death, he called for the assignment Danser had made to him, and which he had left when he gave direction for the draft of the one to the complainant, and stated that he meant to do what was right about the matter, but he would

Church v. Sterling, 16 Conn. 388; *Hayden v. Denslow*, 27 Conn. 335; *Verzier v. Convard*, 75 Conn. 1; *McCartney v. Fletcher*, 11 App. D. C. 1; *Gallagher v. Northrup*, 215 Ill. 563; *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 98; *McKinley v. Hessen*, 202 N. Y. 24; *Jeremiah v. Pitcher*, 26 N. Y. App. Div. 402, aff'd 163 N. Y. 574; *Spaulding v. Collins*, 51 Wash. 488.

not execute the assignment to the complainant until things were fixed up; Danser owed him. He took both papers and has never executed the assignment to the complainant. . . .

The trust, it will be observed, affects personal property, and not lands. The subject of it is a debt. That part of the statute of frauds which enacts that all declarations and creations of trusts shall be manifested by writing and signed by the party creating the same, or else shall be void and of no effect, applies only to trusts of lands, and has no application to trusts of personal property. A valid trust of personalty may be created verbally, and proved by parol evidence. A trust of personal property, almost precisely like the one under consideration, and which had been created by mere spoken words, and was supported by only parol evidence, was upheld by Chancellor Williamson in *Hooper v. Holmes*, 3 Stock. 122; also *Kimball v. Morton*, 1 Hal. Ch. 26; *Sayre v. Fredericks*, 1 C. E. Gr. 205; *Eaton v. Cook*, 10 C. E. Gr. 55; 2 Story's Eq. Jur. §972; 1 Perry on Trusts §86. A valid trust of a mortgage debt may be created by parol; for, though a trust thus created cannot embrace the land held in pledge, yet it is good as to the debt, and will entitle the *cestui que trust* to sufficient of the proceeds of sale, when the land is converted into money, to pay the debt. *Sayre v. Fredericks*, supra; *Benbow v. Townsend*, 1 M. & K. 506; *Childs v. Jordan*, 106 Mass. 321.

It must be held, then, that the trust alleged in this case is valid, and if it has been sufficiently proved, the complainant is entitled to have it established and enforced. . . .

There must be a decree establishing the trust and requiring the defendant to execute it. The defendant must pay costs.¹

¹ *Bellasis v. Compton*, 2 Vern. 294; *Benbow v. Townsend*, 1 Myl. & K. 506 (*semble*); *Patterson v. Mills*, 69 Iowa 755; *Sturtevant v. Jaques*, 14 Allen (Mass.) 523; *Childs v. Jordan*, 106 Mass. 321; [*Thacher v. Churchill*, 118 Mass. 108;] *Rice v. Rice*, 107 Mich. 241; *Bucklin v. Bucklin*, 1 Abb. App. (N. Y.) 242, 1 Keyes 141; *Bunn v. Vaughan*, 1 Abb. App. (N. Y.) 253; *Robbins v. Robbins*, 89 N. Y. 251, *accord*. — AMES.

Under the English and almost all the American statutes a trust of personalty may be created by parol. Ames, 187; 51 L. R. A. (N. S.) 1208. In a few jurisdictions an assignment of a trust of personal property must be in writing. Cal. Civ. Code, sec. 1135; Minn. G. S., 1913, sec. 7001; Mont. Rev. Code, 1907, sec. 4630; Neb. R. S., 1913, 2645; N. Y. Consol. L., 1909, Pers. Prop. L., sec. 31; N. Dak. Comp. L., 1913, sec. 5533; Wis. Stat., 1915, sec. 2321.

Chattels real, however, are within the Statute of Frauds. See *Skett v. Whitmore*, Freem. C. C. 280; *Riddle v. Emerson*, 1 Vern. 108; *Hutchins v. Lee*, 1 Atk. 447; *Forster v. Hale*, 3 Ves. Jr. 696, 5 Ves. 308; *Gardner v. Rowe*, 2 Sim. & St. 346, 5 Russ. 258.

CHACE v. GARDNER.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1917.

228 Mass. 533.

BILL IN EQUITY, inserted in a common law writ dated July 21, 1914, against the executor of the will of Katherine F. Gardner, late of Swansea, the aunt of the plaintiff, praying that a trust in favor of the plaintiff be established in a fund of \$2,500 in the hands of the defendant as executor, which constituted the proceeds from the sale of certain real estate in Swansea, as described in the opinion.

In the Superior Court the case was heard by Dubuque, J., who made findings of fact, which are stated in substance in the opinion, and ruled that upon the facts found the plaintiff was entitled to recover the amount of the proceeds from the land sales, namely, \$2,224.75 with interest from the date of the writ. Later by order of the judge a final decree was entered for the plaintiff; and the defendant appealed.

R. L. c. 147, §1, is as follows: "No trust concerning land, except such as may arise or result by implication of law, shall be created or declared unless by an instrument in writing signed by the party or by the attorney of the party creating or declaring the trust."

CARROLL, J. It was found by the judge who heard this suit in equity that the plaintiff's father, Charles F. Chace, and Katherine F. Gardner (brother and sister) owned two tracts of land in Swansea; that by partition proceedings one tract was set off to Charles and one to Katherine; that on September 18, 1880, Charles conveyed to his sister the parcel owned by him, by warranty deed in the usual form, without consideration being paid by the grantee to the grantor, upon the oral agreement that she should hold the land in trust for her own benefit during her life, and after her death it was to become the property of the plaintiff; that, if said real estate was converted into money, the proceeds of the sale were to be held by the grantee to enjoy the income thereof during her life, the plaintiff to be the sole "beneficiary and owner of the principal of said proceeds after his aunt's death;" and that this agreement was made known to the plaintiff by his father and by the grantee. He further found that Mrs. Gardner sold the land in 1907 and 1909, for the sum of \$2,245.75, and deposited the proceeds in several banks in

Fall River "(without mention of any trust) where the same are traceable now; but mingled with other money of hers."

Mrs. Gardner died in 1914. The defendant is the executor of her will. The presiding judge states that "The statute of frauds does not appear to have been pleaded," but it was agreed that the case might be heard as though it had been pleaded. A decree was entered in the Superior Court declaring that the plaintiff was entitled to the proceeds arising from the sale of the real estate, amounting to \$2,245.75 and ordering the defendant to pay that sum of money to the plaintiff. The defendant appealed.

If the oral agreement concerned the real estate alone the statute would apply, the trust could not be enforced and no constructive trust would arise. R. L. c. 147, §1. *Campbell v. Brown*, 129 Mass. 23. *Tourtillotte v. Tourtillotte*, 205 Mass. 547. The statute requiring an instrument in writing for the creation or declaration of a trust applies to a trust concerning land only; an oral trust in personal property is valid. *Chase v. Perley*, 148 Mass. 289. *Taft v. Stow*, 167 Mass. 363.

The judge found that the grantee converted the real estate into money and the fund arising from the sale was in existence at the time of her death; he also found, and there was sufficient evidence to support the finding, that when Mrs. Gardner received the deed of real estate she agreed, if the real estate was converted into money, to hold the proceeds, the income to be hers during her life, the principal to be payable to the plaintiff on her death.

That part of the agreement relating to the proceeds of the sale is separate and distinct from the part relating to the land. When the real estate was converted into money Mrs. Gardner held it as she agreed to hold it when the trust was created; and this trust in personal property did not require a memorandum in writing. The bill is not brought to enforce an oral trust in land; it is brought to enforce a trust in personal property which the defendant has in his possession, and where nothing remains to be done except the payment by the defendant of the amount which he holds as the executor of the trustee.

The rule governing cases of this kind was stated by Mr. Justice Metcalf in *Rand v. Mather*, 11 Cush. 1, 7, as follows: "The true doctrine is this: If any part of an agreement is valid, it will avail *pro tanto*, though another part of it may be prohibited by statute; provided the statute does not, either expressly or by necessary

implication, render the whole void; and provided, furthermore, that the sound part can be separated from the unsound, and be enforced without injustice to the defendant."

In *Trowbridge v. Wetherbee*, 11 Allen, 361, 364, Chapman, J., speaking of the statute of frauds, said: "If some of the stipulations in a contract are within the statute and others are not, and those which are within it have been performed, an action lies upon the other stipulations, if they are separate." The plaintiff in *Zwicker v. Gardner*, 213 Mass. 95, a mortgagor of real estate, was allowed to recover on an oral agreement made with the mortgagee that if the plaintiff would not bid at the foreclosure proceedings, the mortgagee would pay to him the balance that remained after deducting the mortgage, interest and expenses. It was there held that the action was not to enforce an oral contract for the sale of land; that the land had been sold and a part of the contract relating to it had been executed and it was separable from the part of the contract which concerned the excess. The same principle applies in the case at bar: Mrs. Gardner's executor holds the proceeds of the sale by reason of an agreement made by his testatrix that this money was to belong to the plaintiff after her death. This section of the agreement is separable from the part relating to the real estate, to which part alone the statute applies, and which has been fully performed. See *Page v. Monks*, 5 Gray, 492; *Wetherbee v. Potter*, 99 Mass. 354, 361; *Lyman v. Lyman*, 133 Mass. 414; *Graffam v. Pierce*, 143 Mass. 386.

Accordingly, where land has been conveyed on a parol trust to hold the proceeds for a certain purpose, if that event has taken place and the land is converted into money, the statute of frauds is not a defence. The trust will be enforced although there was no declaration of trust subsequent to the conversion. *Lasley v. Delano*, 139 Mich. 602. *Bork v. Martin*, 132 N. Y. 280. *Logan v. Brown*, 20 Okla. 334. And see *Bailey v. Wood*, 211 Mass. 37.

There are some decisions at variance with what is here decided. See 39 Cyc. 52, where the cases are collected. But we think the conclusion which we have reached is supported by both principle and authority. In view of what has been said it is unnecessary to consider the other questions which have been discussed.

*Decree affirmed with costs.*¹

¹ The same result was reached in *Miller v. Kendig*, 55 Iowa 174 (and see *Allen v. Rees*, 136 Iowa 423); *Michael v. Foil*, 100 N. C. 178; and *Kickland*

GARDNER v. ROWE.

CHANCERY. 1825.

2 Sim. & St. 346.¹

THE VICE-CHANCELLOR [SIR JOHN LEACH].² On the 1st of January 1812, the Earl of Mount Edgumbe, by indenture of that date, granted to the bankrupt, George Wilkinson, the lease or set of a certain mine, called the Wheal Regent Mine, for a term of twenty-one years, for the considerations therein mentioned; and, by an indenture bearing date the 23d August 1813, the bankrupt, George Wilkinson, who, at the request of Rowe, had previously assigned five fourteenths to one Brodrick, after reciting that his name was used in the said indenture of the 1st January 1812 as a trustee for Joshua Rowe, assigned and transferred the remaining fifty-nine parts or shares to the said J. Rowe, for the residue of the said term. It is admitted that, prior to this assignment, an act of bankruptcy had been committed by the said George Wilkinson, and that a Commission of Bankrupt was duly issued against him in the month of November 1813; and the present bill is filed by the assignees of Wilkinson under that commission against J. Rowe, and certain other

v. Menasha etc. Co., 68 Wis. 34, where there was no agreement to sell the land but only to pay over the proceeds if the land were sold.

The same result was reached in the following cases where the grantee orally agreed to sell the land and to pay over the proceeds. *Mohn v. Mohn*, 112 Ind. 285; *Thomas v. Merry*, 113 Ind. 83; *Talbot v. Barber*, 11 Ind. App. 1; *Hall v. Hall*, 8 N. H. 129; *Graves v. Graves*, 45 N. H. 323; *Bork v. Martin*, 132 N. Y. 280; *Logan v. Brown*, 20 Okla. 334. See also *Rosenberg v. Drooker*, 229 Mass. 205. But see *contra*, *McGinness v. Barton*, 71 Iowa 644; *White v. McKenzie*, 193 Mich. 189.

If the grantee after converting the land into money orally admits that he holds the money in trust, the trust is enforceable. *Calder v. Moran*, 49 Mich. 14; *Tracy v. Tracy*, 3 Bradf. (N. Y.) 57; *Maffitt v. Rynd*, 69 Pa. 380; *Everhart's App.*, 106 Pa. 349; *Hess' App.*, 112 Pa. 168. See *Aynesworth v. Haldeman*, 2 Duv. (Ky.) 565.

But if the grantee of land orally agrees to sell it and to pay the proceeds to the *cestui que trust*, and refuses to sell it, the *cestui que trust* cannot reach the land or compel a sale. *Gee v. Thrailkill*, 45 Kan. 173; *Pearson v. Pearson*, 125 Ind. 341; *Grantham v. Conner*, 97 Kan. 150; *Walters v. Walters*, 172 N. C. 328.

See 8 L. R. A. (N. S.) 1137; 20 L. R. A. (N. S.) 298; *Perry, Trusts*, secs. 79n. (a), 86.

¹ Affirmed, 5 Russ. 258.

² The statement of facts is omitted.

persons claiming interest under him in the Wheal Regent Mine, for the purpose of having it declared that the lease of the Wheal Regent Mine is the property of the bankrupt. On the hearing of this cause the plaintiffs contended that it was established, by the evidence in the cause, that, at the time of the grant from Lord Mount Edgcumbe, it was the purpose of the bankrupt and J. Rowe, that the bankrupt should hold the lease for his own benefit, and not as a trustee for J. Rowe; and the plaintiffs further contended, as a point of law, that if in fact it had been the purpose of the bankrupt and J. Rowe, at the time of the grant from Lord Mount Edgcumbe, that the name of the bankrupt should be used as a trustee for J. Rowe, yet that such trust could not prevail, because there was no written declaration of trust within the Statute of Frauds other than the indenture of 24th August 1813, which, being executed by the bankrupt after his bankruptcy, could not operate to defeat the claim of his assignees.

It appeared to me, at the hearing, that I could not properly enter upon the consideration of this point of law, without first coming to a conclusion upon the fact, whether the name of the bankrupt was or not used in the indenture of January 1812 as a trustee for the defendant J. Rowe, and I directed an issue accordingly. At the trial of this issue, the jury found that the name of the bankrupt was used as a trustee for J. Rowe; and a motion having been made before me by the plaintiffs for a new trial of that issue, I refused to disturb the verdict.

The question which has now been mainly argued before me is, whether the indenture of the 24th August 1813, having been executed by the bankrupt subsequent to his bankruptcy, can or not be received as against his assignees as a declaration of trust in writing. Upon a consideration of the several cases which have been referred to in the argument, it does not appear to me that any authority has been produced which is directly in point. All the cases establish that a bankrupt cannot, by any act subsequent to his bankruptcy, transfer any interest from his assignees. Thus, a bankrupt cannot defeat the interest of his assignees by a power of appointment. Can the bankrupt be said to have any interest in this mine at the time of his bankruptcy? He might have recovered possession of this mine by force of his legal title; but he would then have recovered, not in respect of his interest, but by converting a statute, made for the prevention of fraud, into an instrument of his own fraud.

It is not disputed that this deed of August 1813 would have prevailed against the assignees, as a declaration of trust, if it had been executed before the bankruptcy. Yet a mere voluntary deed, executed before the bankruptcy, will not prevail against the assignees. This deed, therefore, in respect to the moral obligation on the trustee to give effect to his trust, would not, in such case, have been considered as a mere voluntary deed. If, in respect of the moral obligation affecting the trustee, this declaration of trust would have prevailed against the assignees if executed the day before the bankruptcy, without any other consideration, I cannot find a principle why it should not prevail against the assignees, if executed the day after the bankruptcy, especially when it is considered that a trust does not pass by assignment in the bankruptcy. For these reasons, I am of opinion that the indenture of 24th August 1813, though executed after the bankruptcy, is a good declaration of trust in favour of J. Rowe, within the Statute of Frauds. It has been slightly argued that the letters of the bankrupt do manifest a trust in writing within the Statute of Frauds; and further, that a trust in this case is to be implied from the fact that Rowe actually directed the working of the mine, and paid the expenses of it; but I do not think it necessary to give any opinion on these points. The bill must therefore be dismissed, and with costs.¹

¹ EFFECT OF SUBSEQUENT MEMORANDUM. 1. *As against the trustee.* In jurisdictions where by the terms of the statute a trust must be "manifested and proved" by a writing, a subsequent admission in writing by the party to be charged is as effectual as a declaration of a trust in the instrument creating it. And this admission, like any other, may be contained in almost any conceivable document, as a letter, pamphlet, petition, answer, deposition, receipt, contract, or the like. *Forster v. Hale*, 3 Ves. Jr. 696, 707, 5 Ves. 308, 315, is the leading case on this. See *Ames*, 178.

Statutes requiring trusts to be "created or declared" in writing have received a similar interpretation. *Jenkins v. Eldredge*, 3 Story (U. S.) 181, 294 (*semble*); *Bates v. Hurd*, 65 Me. 180; *McClellan v. McClellan*, 65 Me. 500; *Urann v. Coates*, 109 Mass. 581. Even when the trust must be "created or declared by deed or conveyance in writing," the deed or conveyance may be subsequent to the creation of the oral trust. *Sime v. Howard*, 4 Nev. 473; *Wright v. Douglass*, 7 N. Y. 564 (see, however, *Cook v. Barr*, 44 N. Y. 156, 159); *White v. Fitzgerald*, 19 Wis. 480. Compare *Loring v. Palmer*, 118 U. S. 321, 339. If the statute requires the trust to be "created" or "created and declared" in writing, a subsequent memorandum would seem to be insufficient. The court so decided in *Richardson v. Woodbury*, 43 Me. 206, 212, interpreting Me. Rev. St. (1841), c. 91, sec. 31, now repealed. But see, *contra*, *Gaylord v. Lafayette*, 115 Ind. 423, 428. The question was expressly

MATTHEWS v. THOMPSON.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1904.

186 Mass. 14.

KNOWLTON, C. J.¹ Edward Thompson, the testator of the plaintiff in the first suit, became indebted from time to time in left open in *Patton v. Beecher*, 62 Ala. 579, 587. See *Perry, Trusts*, secs. 80, 81.

2. *As against creditors of the trustee.* If the trustee of land under an oral trust conveys to the *cestui que trust* or to his appointee, the conveyance cannot be impeached by the trustee's general creditors. Ames, 181. In *Hays v. Reger*, 102 Ind. 524; *McVay v. McVay*, 43 N. J. Eq. 47, 49; *Minns v. Morse*, 15 Oh. 568; *Leffersom v. Dallas*, 20 Oh. St. 68; *Pinney v. Fellows*, 15 Vt. 525; *Main v. Bosworth*, 77 Wis. 660; and *Blaha v. Borgman*, 142 Wis. 43, the conveyance was allowed to stand although made after a creditor of the trustee had obtained a judgment lien upon the land. But see, *contra*, *Connor v. Follansbee*, 59 N. H. 124; *Dewey v. Dewey*, 35 Vt. 555, 560 (*semble*); *Skinner v. James*, 69 Wis. 605.

In some cases the same result has been reached in the case of an oral antenuptial settlement. *Re Holland*, [1902] 2 Ch. 360. But there are cases in which the opposite view is taken; seemingly because of the peculiar danger of fraud against creditors. Ames, 181.

3. *As against the trustee in bankruptcy of the trustee.* See in addition to the principal case: *Ambrose v. Ambrose*, 1 P. Wms. 321; *Re Holland*, [1902] 2 Ch. 360; *Re Farmer*, 18 N. B. R. 207, 216 (*semble*); *Bailey v. Wood*, 211 Mass. 37; *lauch v. De Socarras*, 56 N. J. Eq. 524, *accord*. See also *Smith v. Howell*, 3 Stockt. (N. J.) 349.

4. *As against the wife of the trustee.* An oral contract by a bachelor to convey land, if performed after his marriage, deprives his wife of dower. *Jones v. Jones*, 281 Ill. 595; *Johnston v. Jickling*, 141 Iowa 444; *Oldham v. Sale*, 1 B. Mon. (Ky.) 76. Cf. *Ambrose v. Ambrose*, 1 P. Wms. 321. But see *Bartlett v. Tinsley*, 175 Mo. 319.

5. *As against one who has contracted to purchase from the trustee.* If A contracts orally to convey certain land to B, and then contracts in writing to convey the same land to C, and finally conveys to B, who has notice of the written contract in favor of C, it is held that B may keep the land. *Dawson v. Ellis*, 1 J. & W. 524 (*semble*); *Clarke's Adm'r. v. Rucker*, 7 B. Mon. (Ky.) 583, 585 (*semble*); *Maguire v. Heraty*, 163 Pa. 381. See *Atlanta etc. Co. v. Southern etc. Co.*, 131 Fed. 657. Query, if A simply made a memorandum of the contract with B, without conveying to B. See *Hunter v. Bales*, 24 Ind. 299.

6. *As against a purchaser from the trustee.* But a *cestui que trust* under an oral trust is cut out by a sale by the trustee, although the purchaser has notice of the oral trust. See *Pickerell v. Moras*, 97 Ill. 220; *Van Cloostere v. Logan*, 149 Ill. 588; *Wright v. Raftree*, 181 Ill. 464; *Koenig v. Dohm*, 209 Ill. 468; *Asher v. Brock*, 95 Ky. 270.

¹ The statement of facts and a part of the opinion are omitted.

a considerable sum to his unmarried sisters, Elizabeth B. Thompson and Frances M. Thompson, who were old ladies unfamiliar with business. Of his own motion, he made to them, as security, a mortgage of the real estate in question, subject to other mortgages which together amounted to about \$37,000, and afterwards he caused them to foreclose this mortgage. A conveyance of the property, subject to the prior mortgages, was made to his son, who held it as agent of these sisters of the testator. Subsequently the testator caused his son to convey the property to the testator's nephew, one Eldridge, who executed a declaration of trust for the benefit of the old ladies, to secure them for their previous mortgage debts, and also for the benefit of their brother, Henry Thompson, to secure him for any advancements that he might make to Edward Thompson, and any other claims that he might hold against Edward. The declaration of trust also provided that after the payment of these debts the trustee should pay the balance, if any, to Edward Thompson. This declaration was not acknowledged nor recorded. It was understood that Edward Thompson was to have the entire management of the property, and these arrangements for security were made at his suggestion. At the end of about a year and a half, at his request, a paper was signed by the beneficiaries and sent to Eldridge, as follows:

"September 16, 1896.

Mr. William T. Eldridge,

Dear Sir, — We hereby request and authorize you to convey to Edward Thompson the real estate in Boston conveyed to you by Frederick P. Thompson.

Henry Thompson
Elizabeth B. Thompson
Frances Mary Thompson."

The testator enclosed this paper to Eldridge and asked him for a conveyance of the real estate. Thereupon, on October 6, 1896, Eldridge conveyed the land to Edward Thompson by a deed which was duly recorded, and which contained no reference to a trust. The deed was in the form of an ordinary quitclaim, purporting to be for a consideration of \$1 paid by Edward Thompson, not describing him as trustee, and it contained a warranty that the premises were free from all incumbrances made or suffered by Eldridge, and a warranty against the lawful claims and demands of all persons claiming by, through or under

him. This deed was delivered by Eldridge to Edward Thompson and was duly recorded. After this conveyance Edward Thompson held the land as if it were his own, mortgaged it several times for his own debts, had repeated negotiations for the sale of it, and treated it in all respects as if he were the absolute owner of it. The first question in the cases is whether he held it charged with a trust in favor of his brother and sisters, so that it still remains subject to this trust in the hands of his widow, to whom it was afterwards conveyed in his lifetime.

In reference to the transfer from Eldridge to the intestate, the presiding justice found "as a fact that the intention of all parties interested, including that of the retiring trustee, Mr. Eldridge, was not that Mr. Edward Thompson should hold as trustee." He found, "that the intention of his brother and sisters and of the retiring trustee was that the title should go back to him, Edward Thompson, and that the brother and sisters relied upon his saying what he would do in regard to their debts, not because he was a trustee, but because he was their brother and they were willing to trust him."

As all the parties were of full age, and as the trust was created by an arrangement to which the trustee and the *cestuis que trust* were the only parties, there is no doubt that they could terminate it at any time. *Smith v. Harrington*, 4 Allen, 566. *South Scituate Savings Bank v. Ross*, 11 Allen, 442. *Sears v. Choate*, 146 Mass. 395. *Brown v. Cowell*, 116 Mass. 461. Upon the findings of the judge, it is plain that they undertook to terminate it and supposed that they had terminated it. The plaintiffs in the second suit, the former *cestuis que trust*, rely upon the Pub. Sts. c. 120, §3, (R. L. c. 127, §3,) which provides that "No estate or interest in land shall be assigned, granted, or surrendered unless by such writing [an instrument in writing signed by the grantor or by his attorney] or by operation of law." The kind of instrument in writing required under this section depends upon the nature of the interest to be assigned or surrendered. In the present case, not only the legal estate, but by the record title an absolute estate in fee, including equitable interests as well as legal, was in Eldridge. This title was affected only by an unacknowledged and unrecorded paper. By his deed to Edward Thompson, Eldridge assigned and conveyed, according to the record, a perfect title subject to prior mortgages. This deed was an instrument in writing. The only additional instrument required by the statute was a writing which would relieve

the grantor from the consequences of what would have been a breach of trust if he had acted without authority from the *cestuis que trust*. Nothing more was needed to pass a title which was free from equities. As applied to conditions like the present, we are of opinion that the assignment of the equitable rights of the plaintiffs in the second suit, made by a deed of one who held of record a perfect title and who acted under their authority given in writing, was a compliance with the statute. If we consider it as a surrender of equitable rights, we are of opinion that the paper which they signed was all the instrument required by the statute, it being given as an authority to be acted upon, and which was in fact acted upon, by the trustee who held of record an absolute title. The principle is analogous to that which has been applied to the surrender and cancellation of an unrecorded deed of defeasance, given in connection with an absolute deed to constitute a mortgage. When this is done in good faith, and is subsequently acted upon by the person to whom the surrender is made, the original holder is estopped from setting up the surrendered instrument against the existing title. *Trull v. Skinner*, 17 Pick. 213. *Falis v. Conway Ins. Co.* 7 Allen, 46, 49. See also as to parol waiver by *cestuis que trust* under the statute of frauds, *Kline's appeal*, 39 Penn. St. 463; *Miller v. Pierce*, 104 N. C. 389; *Gorrell v. Alspaugh*, 120 N. C. 362, 368. The action of the parties, taken in good faith, makes it impossible in equity for the *cestuis que trust* to hold the trustee for a violation of his duty in making the conveyance, or to charge the conscience of the grantee having knowledge of the previous trust, with a duty to hold subject to the trust.

The suggestion that the trust could not be discharged without the action of the prior mortgagees is not well founded. They are not *cestuis que trust* under the declaration, but the reference to the mortgagees and the payment of their debts is only a recognition of the prior incumbrances subject to which the trust must be executed, and the payment of which would be a necessary preliminary to the payments to the sisters and brother.

We are of opinion that Edward Thompson took the property discharged from the trust, and that the second bill must be dismissed.¹ . . .

¹ In *Gorrell v. Alspaugh*, 120 N. C. 362 (resulting trust), and *Warren v. Tynan*, 54 N. J. Eq. 402, reversing *Tynan v. Warren*, 53 N. J. Eq. 313 (resulting trust), it was held that no memorandum was necessary.

There is a dispute on the question whether a contract for the sale of land

TIERNEY v. WOOD.

CHANCERY. 1854.

19 Beav. 330.

IN January, 1836, Alexander Wood purchased a house, a close of land, and premises, situate at Little Hampton, in Sussex, for the sum of 490*l*. They were conveyed to the plaintiff Tierney in fee, who admitted he held them in trust for Wood.

About the same time, Wood transferred a sum of stock into the plaintiff's name; but by his direction the plaintiff afterwards sold it out, and delivered the proceeds of the sale to Wood.

Soon after the purchase of the house, land, and premises, Wood delivered to the plaintiff a paper writing, signed by him, and dated January, 1837, in these words: "I hereby desire that, after my death, the stock now in the Bank of England, with the house and land now belonging to me at Little Hampton, shall be held by you, as you at present hold it, for the benefit of my wife, Elizabeth Wood, during her life, and that after her death the same shall continue to be held by you as aforesaid, for the sole benefit of my daughter, Mary Wood, in such sort that it shall be wholly and entirely free from all control of any person with whom she may intermarry. I further desire that, in case my said daughter Mary should leave issue by any marriage which she may contract, the whole of the above property shall pass to such issue, in such manner as she may direct; but that, in case she should die without issue, the whole of the above property shall be equally divided among the lawful issue of my son Alexander Wood, born after 1834, he to have the interest and profits arising from the property during his life. If my son should die without issue, I desire that all the property may be sold, and the money be equally divided among my late brother's children now living at Old Craig," &c. "After the death of my wife, I wish my son Alexander to be paid 100*l*. in money, or to be may be rescinded by parol. See *Warden v. Bennett*, 145 Ky. 325; *Buel v. Miller*, 4 N. H. 196; *Miller v. Pierce*, 104 N. C. 389; *Wisner v. Field*, 15 N. D. 43; *Boyce v. M'Culloch*, 3 W. & S. (Pa.) 429; *Brownfield's Ex'rs v. Brownfield*, 151 Pa. 565, in which a parol rescission was allowed. See *Goss v. Nugent*, 5 B. & Ad. 58, 66. But see *contra*, *Barrett v. Durbin*, 106 Ark. 332; *Catlett v. Dougherty*, 21 Ill. App. 116; *Sanborn v. Murphy*, 86 Tex. 437.

In New York it is provided by statute that a trust in real property cannot be surrendered unless by act of law or by a deed or conveyance in writing. *Consol. Laws*, 1909, *Real Prop. L.*, sec. 242. See also *Minn. Gen. St.*, 1913, sec. 7002.

paid 5*l.* a year during his life. If my son Alexander and my daughter Mary have both issue, let the property be equally divided among them; if they have no issue, give 100*l.* to such charity as Mr. Jones's at St. Leonards. Let my son have my books on gardening, my shirts, or any of my clothes that may be of use to him, if he desire to have them.

"ALEXANDER WOOD. January, 1837.

"To the Rev. M. A. TIERNEY."

Alexander Wood, the elder, died in 1844, intestate, and the plaintiff allowed Mrs. Wood, his widow, to receive the rents of the premises, till her death in June, 1853.

Alexander Wood, the son and heir at law of Alexander Wood the elder, and Mary Wood, the daughter, were living; but the latter has never been married, and questions having arisen as to the rights of the parties interested in the property of Alexander Wood the elder, and as to the effect of the paper writing, the plaintiff instituted the suit to obtain the opinion of the court thereon.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY] was of opinion that Mary Wood took an estate tail, but reserved his judgment as to the validity of the declaration of trust.

THE MASTER OF THE ROLLS. The question is, whether the document dated in January, 1837, created a good declaration of trust within the seventh section of the Statute of Frauds. That clause is in these words, or to this effect: That after the 24th of June, 1677, all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

The first question raised is, whether Alexander Wood is the person who is by law enabled to declare the trusts of these lands.

The second question is, whether, if he be, this is a declaration of trust, and such a one as can be acted upon.

There is no question but that on the purchase of this property by Alexander Wood, and the conveyance thereof to the Rev. M. A. Tierney, a resulting trust arose in favour of Alexander Wood, which, as it is expressly excepted by the eighth section of the Statute of Frauds, does not require to be evidenced by any writing.¹ In the year 1836, therefore, and previous to the signing of this document, the property in question was vested in M. A. Tierney, in fee, in trust for Alexander Wood, in fee

¹ See Chap. IV, sec. IV, *post*.

simple. Alexander Wood, therefore, was the beneficial owner of this property, and Mr. Tierney had the mere naked legal interest in it. A distinction may be raised between the person who is by law enabled to declare, and the person who is by law entitled to create the trust. I consider, in the first place, who was by law entitled to create a trust in this property; and, first, I examine what, in such a state of things, would have been the effect of this document, so far as it relates to the stock, which had been transferred into the name of M. A. Tierney, if this had not been sold out afterwards by the direction of Alexander Wood, and the direction to pay the dividends had been complied with by Tierney. The result would have been that the relation of trustee and *cestui que trust* between Tierney and the person mentioned in the instrument would have been completed, so far as that stock was concerned, and the fact that the document had been a voluntary act on the part of Wood would not have prevented this court from acting upon it. The case of *Ex parte Pye and Dubost*, and the authorities referred to in *Bridge v. Bridge*, 16 Beav. 315, decided by myself, establish this proposition. Those authorities show that the proper person to create the trust in personal property is the person in whom the beneficial interest of the property is vested; and the trust being created by the beneficial owner, the trustee is bound, and, if disposed to refuse, may be compelled, to obey it.

I am at a loss to find any reason which should cause this document to be effectual as a declaration of trust, so far as the stock is concerned, and not so, so far as the land is concerned. It is obvious that in both cases the person enabled by law to declare the trusts is the same. In the case before me, there can be no doubt that, if Mr. Tierney had, in pursuance of this paper, signed a document to the same effect, stating that he held the property on the trusts therein mentioned, the trusts would, apart from any question on the construction of the document, have been fully and completely declared; and it is also clear, that if the trustee had declared that he held the property on any trusts not recognized or sanctioned by Alexander Wood, the beneficial owner, such declaration of trust would have been insufficient and unavailing, and would have given no interest to the supposed *cestui que trust*. A declaration of trust in writing by Tierney following that of Wood would therefore have been merely formal, and would have been valid only so far as it followed his instructions, and would have been void

to the extent, if any, that it departed from his directions. I think that the fair conclusion to be drawn from these considerations is, that the person to create the trust, and the person who is by law enabled to declare the trust, are one and the same; and that, consequently, the beneficial owner is the person by law enabled to declare the trust.

This is confirmed by the expression in the clause in the statute which relates to "the last will in writing," which can only apply to the beneficial owner. It may also be observed, that if the statute had intended that no trust should be valid, unless evidenced by a writing signed by the trustees, the simple and obvious course would have been to have so stated it; but the expression used is not "the trustee," but "the person by law enabled to declare the trust." That person, is, I think, the beneficial owner; and I am of opinion that, apart from any question of the construction of the document, the fact of its having been signed by Wood, the beneficial owner, transmitted by him to Tierney, the legal owner, and by him acted upon, constitutes it a sufficient declaration of trust within the seventh clause of the statute, so far as that clause requires it to be signed "by the party who is by law enabled to declare such trust."

The next question is, whether the document itself, apart from the signature, is or purports to be a declaration of trust at all. It is contended that, if anything, it is a will imperfectly executed, that it contains no direction as to the present application of the rents, and that the rest of its contents savor of the directions contained in a will rather than of a direction how to apply the rents of the property; for that it is not to take effect till after the death of Alexander Wood, and that it contains directions for sale and the like, inconsistent with the nature and duties of the trust which M. A. Tierney had accepted. There is, undoubtedly, some force in these observations; but, on the whole, I think that this may be treated as a valid declaration of trust. Although it does not declare the whole trust, it declares the trust of a part, and it leaves the resulting trust untouched, except where it expressly interferes therewith. If this document had directed Mr. Tierney to pay the rent to Mr. Wood during his life, and had then proceeded as it does, this objection could not, in my opinion, have been sustained; but this omission is not sufficient to destroy the character of the rest of the interest, which, unless where it otherwise disposes of the beneficial interest in the property, leaves it untouched,

under the resulting trust vested in Mr. Wood. I am of opinion, therefore, that a good trust was evidenced by this writing within the Statute of Frauds.

The only remaining question is the interest which Mary Wood takes in the land so held in trust for her, and my opinion is that she takes an estate tail.¹

¹ 1. *Declaration of trust.* If one declares himself trustee he is of course the proper party to execute the memorandum, whether at the time of the creation of the trust or subsequently. As to the sufficiency of a declaration of trust made prior to the creation of the trust, see *Compo v. Jackson Iron Co.*, 49 Mich. 39.

2. *Transfer upon trust.* a. *For the transferor.* It is of course sufficient if the trust is declared in the instrument by which the estate is transferred. As to the sufficiency of a contemporaneous memorandum signed by the transferor, see *Ellison v. Ganiard*, 167 Ind. 471; *Rogers v. Rogers*, 52 Wis. 36 (not known to grantee). As to the sufficiency of a memorandum signed by the transferee, see *Forster v. Hall*, 3 Ves. Jr. 696; *Nesbit v. Stevens*, 161 Ind. 519 (prior to transfer); *Barrell v. Joy*, 16 Mass. 221; *Urann v. Coates*, 109 Mass. 581; *McVay v. McVay*, 43 N. J. Eq. 47; *McCandless v. Warner*, 26 W. Va. 754. See note to *Gardner v. Rowe*, *ante*. On the question whether there is a resulting trust if no memorandum is executed, see *post*, Chap. IV, sec. III.

b. *For a third person.* It is of course sufficient if the trust is declared in the instrument by which the estate is transferred. As to the sufficiency of a contemporaneous memorandum signed by the transferor, see *Gaylord v. LaFayette*, 115 Ind. 423, 428. As to the sufficiency of a contemporaneous memorandum signed by the transferee, see *Holmes v. Holmes*, 65 Wash. 572, Ann. Cas. 1913B 1023. As to the sufficiency of a subsequent memorandum signed by the transferor, see *Phillips v. South Park Commissioners*, 119 Ill. 626, 629. As to the sufficiency of a subsequent memorandum signed by the transferee, see *Union etc. Co. v. Campbell*, 95 Ill. 267; *Myers v. Myers*, 167 Ill. 52; *Bates v. Hurd*, 65 Me. 180; *M'Clellan v. M'Clellan*, 65 Me. 500; *Baldwin v. Humphrey*, 44 N. Y. 609; 3 *Pomeroy*, Eq. Juris., sec. 1007. On the question whether there is a resulting trust if no memorandum is executed and if the transferee refuses to carry out the trust, see *post*, Chap. IV, sec. III.

3. *Purchase in the name of another.* If A purchases property but takes title in the name of B, a memorandum signed by B showing the actual terms on which he took title is sufficient. *Whackenbush v. Leonard*, 9 Paige (N. Y.) 334 (contemporaneous memorandum); *Bragg v. Paulk*, 42 Me. 502 (subsequent memorandum). But if such memorandum shows different terms than those agreed upon it will not bind A. *Kronheim v. Johnson*, 7 Ch. D. 60; *Adams v. Carey*, 53 N. J. Eq. 334; *Griffith v. Eisenberg*, 215 Pa. 182. See *Dale v. Hamilton*, 2 Phil. 266. On the question whether there is a resulting trust if no memorandum is executed, see *post*, Chap. IV, sec. IV.

4. *Assignment by the cestui que trust.* When the *cestui que trust* assigns his interest, the memorandum whether executed contemporaneously with or subsequently to the assignment should be signed, according to the express provision of section IX, by the assignor.

SECTION IV.

Statutes of Wills.

THE WILLS ACT.

7 Will. IV. & 1 Vict. c. 26 (1837).¹

IX. AND be it further enacted, That no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

McEVoy v. BOSTON FIVE CENTS SAVINGS
BANK.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1909.

201 Mass. 50.

CONTRACT, by a trustee under an instrument in writing executed by Jane Lever of Boston during her lifetime, against the Boston Five Cents Savings Bank, for \$1,017.50, the amount of a deposit standing in the name of Jane Lever, who died in April, 1902. Writ in the Municipal Court of the City of Boston, dated November 22, 1902.

Andreas Blume was appointed administrator of the estate of Jane Lever, and thereafter was admitted as a claimant in the action.

On appeal to the Superior Court the case was tried before AIKEN, C. J. The following facts appeared in evidence: On April 9, 1902, Jane Lever executed and delivered to the plaintiff the following two instruments in writing:

"Commonwealth of Massachusetts.

"I, Jane Lever of Boston in the County of Suffolk and Commonwealth of Massachusetts in consideration of the love and affection that I have for my relatives herein named hereby give, transfer and convey to John J. McEvoy all my personal property

¹ For the earlier English statutes and some typical American statutes relating to wills, see Warren, *Cas. Wills*, 27-42.

consisting of six hundred and fifty one dollars and seventy cents in the Elliott Five Cent Savings Bank of Boston, two hundred and sixty dollars in the Institution for Savings of Roxbury, Boston, one thousand and fifty three dollars and forty one cents in the Boston Five Cent Savings Bank of Boston in trust for the following uses:

"(1) Said trustee shall pay to me such moneys as I may demand of him at any time during my life until I have used the amount conveyed to him by me by this deed.

"(2) Upon my death said trustee shall pay my funeral expenses. And the sum of fifty dollars to my nurse Mary M. Wilson for services rendered as nurse.

"(3) After my death said trustee shall pay to my husband, Joseph Lever, if he survives me, the sum of three dollars per week during his life or as long as said trust funds shall last.

"(4) If upon the death of my husband and myself there are any funds remaining in the hands of said trustee said trustee shall divide said balance of said trustee funds in equal parts and give said parts to my second cousin, Jane Anne Harrison of Bolton, Lancastershire, England, to my second cousin Thomas Wilson, of Bolton, Lancastershire, England, to the two children of my second cousin, Edward Wilson late of Bolton, Lancastershire, England, to my second cousin Mary Wilson of Bolton, Lancastershire, England. I hereby reserve to myself the right to revoke this deed at any time during my life.

"Witness my hand and seal at Boston this ninth day of April, 1902.

her

Jane X Lever (Seal)
mark."

"Witnessed by

"William W. Clarke.

Mary A. McTighe.

Mary M. Wilson."

"April 9, 1902.

"To the Treasurer of the Boston Five Cents Savings Bank.

Boston, Mass.

"Sir: — Please pay to John J. McEvoy all the moneys that have been and may be deposited, together with the interest that has and may become due on account of Book No. 17722.

her

"William Burns.

Jane X Lever
mark."

Under the second of the instruments printed above, the plaintiff drew interest on the deposit in the defendant bank during the lifetime of Jane Lever. Jane Lever died in the latter part of April, 1902. The plaintiff testified that the doctor who attended Jane Lever in her last sickness had a bill for his services and the nurse had a bill; that there were funeral and other bills; that at the time of the execution of the trust deed and until the time of her death Jane Lever was living with her husband, Joseph Lever; that the plaintiff knew of no property which she possessed other than that which he had taken possession of under the instruments printed above; that he had one bank book of a bank in Roxbury transferred to him; that the amount was about two hundred and thirty or two hundred and forty dollars; that he presented the assignment to the bank and got the book and put the money right back in his name; that there was also the bank account which is the subject of this action and also an account in the Eliot Five Cents Savings Bank that he had not transferred; that he was the executor of the will of Joseph Lever, the husband of Jane; that Joseph died twelve weeks after his wife and left \$530 that was deposited in the defendant bank; that the amount left by Jane Lever in the Eliot Five Cents Savings Bank was about \$600 and the amount left by her in the defendant bank was about \$1,000; that she left a little less than \$2,000 all told; that during her lifetime the plaintiff drew \$70 in interest on the account in the defendant bank; that there were outstanding unpaid bills of the doctor for \$30 and one or two other small bills; that she told him to pay all legitimate bills; that there was an undertaker's bill; that part of it had been paid; that he also sent for a person in England that Mrs. Lever wanted to come over here; that he sent her \$30; that he paid the minister and bought Mr. Lever a suit of clothes; that he paid Mr. Lever \$3 per week during his lifetime; that he did not know of any bills other than the undertaker's, the doctor's and the nurse's; that he paid out \$125; that there were bills of \$250 outstanding, the doctor's, nurse's and undertaker's bills and a milk bill; and that what he paid out included what he paid the undertaker. He further testified as follows: "Q. And you understood that she intended by this instrument to dispose of the property after she was dead as well as while she was living?" That is what you understood, was it not? A. Yes, that is what she told me. — Q. You understood that was what she intended at the time? A. Yes. — Q. That

she intended this instrument in place of any will she might leave? A. She did."

The above was all the material evidence in the case. The plaintiff asked the judge to rule that upon all the evidence the claimant was not entitled to recover. The judge refused to make this ruling, and found for the claimant in the sum of \$1,017.50, that being the amount represented by the book in the defendant bank, standing in the name of Jane Lever at the time of the service of the plaintiff's writ, together with whatever interest might have accrued since on that account, less the costs of the defendant taxed at \$34.55 and without costs to the claimant. The plaintiff alleged exceptions.

The case was submitted on briefs.

KNOWLTON, C. J. The question in this case is whether the assignment to a trustee, made by Jane Lever, was a transfer of her property which divested her of her ownership and control during her lifetime, or whether it was in intention and legal effect an attempted testamentary disposition of such of her money as should remain at her decease. The property included in the conveyance was merely the deposits in certain savings banks. The trustee testified that she told him she intended to dispose of the property after she was dead as well as while she was living, and that she intended the instrument in place of any will she might leave. There was in the deed an express reservation of a power of revocation. This in itself would not render it invalid if the instrument otherwise seemed intended to divest her of her absolute control of the property, as owner or as *cestui que trust* during her life, and to deprive her of the rights of a beneficiary who has a perfect power of disposition under the trust.

The trust in this case may be considered first in reference to its effect on the property during her life, and then in reference to its effect upon what might remain after her death. The first statement of the trust by the assignor in the assignment is in these words: "Said trustee shall pay to me such moneys as I may demand of him at any time during my life until I have used the amount conveyed to him by me by this deed." This gave her the right to demand any part or the whole of the money at any time, for any use that she chose to make of it. It left her the sole beneficial owner of it, with an absolute power of disposition as long as she lived. As against her, therefore, the only practical effect of the instrument during her lifetime was

to give the trustee a right to collect and hold the property until she should ask for it. Her rights as beneficial owner during her life were not limited in any material way. She could revoke the trust at any time, or she could demand and receive from the trustee all the money, at any time, under the trust, and then do with it what she chose.

The assignment is very different from that in *Kelley v. Snow*, 185 Mass. 288, in which the only right in the property reserved to the assignor for herself during her life was a right to use the income. While she had a power by the writing to change the disposition of what remained after her death, she could not diminish the property which necessarily would pass to others under the trust.

The other part of the trust created by the instrument in the present case relates solely to the disposition of the property after the assignor's death. It follows that the only material effect of the instrument was testamentary, and that it cannot be given effect under our statutes, which permit a testamentary disposition of property only by a duly executed will. See *Nutt v. Morse*, 142 Mass. 1; *Sherman v. New Bedford Five Cents Savings Bank*, 138 Mass. 581; *Brownell v. Briggs*, 173 Mass. 529; *Welch v. Henshaw*, 170 Mass. 409; *Bailey v. New Bedford Institution for Savings*, 192 Mass. 564.

But, if it be thought that this view of the construction and necessary legal effect of the instrument is too favorable to the claimant, the exceptions must be overruled on the ground that the evidence justified a finding by the trial judge that the paper was intended as a mere testamentary disposition of property, and not as a creation of a trust for any other purpose, and that therefore there was no error of law in the finding.

No question has been raised by either party in regard to the finding and order as to costs, and we do not consider it.

*Exceptions overruled.*¹

¹ The mere fact that the settlor reserves a life interest does not make the disposition testamentary. *Lewis v. Curnutt*, 130 Iowa 423; *Tucker v. Tucker*, 138 Iowa 344; *Scrivens v. North Easton Sav. Bk.*, 166 Mass. 255; *Hallowell Sav. Inst. v. Titcomb*, 96 Me. 62; *Smith v. Savings Bank*, 64 N. H. 228. Nor does the additional fact that the settlor reserves the right to revoke the trusts. *President etc. of Bowdoin College v. Merritt*, 75 Fed. 480; *Booth v. Oakland Bk.*, 122 Cal. 19; *Kelly v. Parker*, 181 Ill. 49; *Lewis v. Curnutt*, 130 Iowa 423; *Stone v. Hackett*, 12 Gray (Mass.) 227; *Kelley v. Snow*, 185 Mass. 288; *Wilcox v. Hubbell*, 197 Mich. 21; *Robb v. Washington & Jefferson*

FROST v. FROST.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1909.

202 Mass. 100.

BILL IN EQUITY, filed in the Supreme Judicial Court by the widow of Albert G. Frost, late of Boston, who died on October 24, 1907, and whose will was admitted to probate, the defendants being named therein as trustees and executors and having qualified by giving bonds as required by law, praying to have the defendants declared to be trustees for the plaintiff's sole benefit under assignments of five life insurance policies alleged to have been made by her husband on May 17 and August 4, 1898, and that the defendants be ordered to pay to her the amounts of life insurance received by them as executors and trustees under the policies in question.

The case was referred to William H. H. Emmons, Esquire, as master.

[It appeared that two of the policies in question were payable to the executors, administrators and assigns of the insured, the other three being payable to his legal representatives. He made an assignment purporting to transfer all his right, title and interest in the several policies to "the trustees to be named in my will" for the sole use and benefit of the plaintiff, his wife.

College, 185 N. Y. 485; Windolph v. Girard T. Co., 245 Pa. 349; Talbot v. Talbot, 32 R. I. 72.

In the following cases it was held that the disposition was testamentary and failed for want of compliance with the requirements of the statutes of wills: — O'Flaherty v. Brown, [1907] 2 I. R. 416; Norway Savings Bk. v. Merriam, 88 Me. 146 (deposit by A payable to A or B); Brown v. Crafts, 98 Me. 40 (transferee gave back to transferor unlimited power of attorney); Bath Savings Inst. v. Fogg, 101 Me. 188 (deposit by A payable to A or B); Mathias v. Fowler, 124 Md. 655 (like last case); Citizens Nat. Bk. v. McKenna, 168 Mo. App. 254; Provident Inst. v. Carpenter, 18 R. I. 287 (deposit to A payable to A and B).

Compare also the following cases in which it was held that an intended transfer was insufficient because there was no sufficient delivery. Basket v. Hassell, 107 U. S. 602; Allen-West Commission Co. v. Grumbles, 129 Fed. 287; Noble v. Garden, 146 Cal. 225; Linn v. Linn, 261 Ill. 606; Russell v. Webster, 213 Mass. 491; Swayze v. Huntington, 82 N. J. Eq. 127. See 3 Gray, Cas. Prop., 2 ed., chap. IX, sec. 2. And see *ante*, Chap. II, sec. II. A reservation by the donor of the right to receive the income for his life does not make the gift incomplete. Calkins v. Equitable etc. Ass'n, 126 Cal. 531; Funston v. Twining, 202 Pa. 88.

The plaintiff was informed of the assignments and assented thereto although she never saw any of the policies or any of the assignments until after her husband's death.¹]

HAMMOND, J. One of the questions is whether the assignments were valid. The plaintiff does not contend that there was a gift, but insists first that the assignments were operative as a perfected trust, and second, that there was a "statutory investiture" under St. 1894, c. 120, which was in force when the policies were taken out and assigned.

1. Was the trust perfected during the lifetime of the assignor? . . .

Who were the assignees? They were to be named in his will. What will? Was it to be the first testamentary document he should thereafter make, whether or not revoked before his death, or was it to be the one which should finally be admitted to probate as his will? The assignor actually made three wills after the assignments were executed and "the trustees named in the different wills were not exactly the same." There can only be one sensible interpretation of the phrase "my will." It must be held to mean the document finally admitted to probate as the will of the assignor. It is certain, therefore, that the trustees could not be finally ascertained until after his death. The assignment could not be delivered to the assignees until after his death. There is nothing to indicate that he intended to make any delivery to any third person to hold for the trustees until they were finally ascertained, nor is it shown upon the facts in the case that he intended to hold the policies himself as trustee. While it is true, as contended by the plaintiff, that the trustees when finally ascertained would derive their appointment under the assignment and not under the will, still it remains equally true that they could not be appointed, nor even ascertained, until after the death of the assignor. It is to be noted that the papers were all retained by the assignor.

Here then is a case where no assignments are delivered to the assignees, nor can they be delivered until after the assignor's death, where also there is no delivery to any one for them and where it does not appear that the assignor intends to hold for them. The language of the assignments seems to point to a testamentary intention, and the whole scheme is manifestly not to take effect as an operative assignment during the lifetime of

¹ The statement of facts is abridged, and a part of the opinion is omitted. The court held that the provisions of St. 1894, c. 120, were not applicable.

the testator. The assignments were of a testamentary nature, and, not being witnessed as required by the statutes concerning wills, were inoperative after his death.

Nor is the defect cured by the assent of the *cestui que trust* to the assignments. While such an assent might have a bearing upon the validity of the trust if there was any question as to notice or acceptance, still it has no effect upon the validity of the assignments upon which the trust depends. The question is not simply whether, assuming the validity of the assignments, the trust was good, but is much deeper, and is whether the assignments upon which alone the trust depends ever became operative in law. The case is plainly distinguishable from *Kendrick v. Ray*, 173 Mass. 305, upon which the plaintiff relies. There the trustee was the beneficiary named in the policy; and the question was as to the terms of the oral trust upon which he received the insurance, and not as to the validity of the appointment of the trustee. See also *Gould v. Emerson*, 99 Mass. 154.

Upon the facts in the case these assignments never took effect within the lifetime of the assignor, for want of assignees, and never took effect after his death for want of proper attestation. There was therefore nothing upon which to base the contemplated trust, and it never was perfected. . . .

Bill dismissed.

MATTER OF TOTTEN.

COURT OF APPEALS, NEW YORK. 1904.

179 N. Y. 112.

APPEAL from an order of the Appellate Division of the Supreme Court in the second judicial department, entered December 30, 1903, which reversed a decree of the Kings County Surrogate's Court rejecting certain claims of the respondent herein against the estate of Fanny Amelia Lattan, deceased.

This is a controversy between the administrator of Fanny Amelia Lattan, deceased, and Emile R. Lattan, who presented a claim against the estate of said decedent which was duly rejected by the representative thereof. The claim was for the sum of \$1,775.03, besides interest, alleged to be due "by reason of certain deposits made by" the decedent "in the Irving

Savings Institution, as trustee for the said Emile R. Lattan, the moneys so deposited having been subsequently withdrawn by the said decedent." Upon the final accounting of the administrator the justice of said claim, in accordance with the stipulation of all concerned, was determined by the surrogate after a referee had reported the evidence, the facts and his conclusion. The surrogate confirmed the report and dismissed the claim upon the merits, but the decree entered accordingly was reversed by the Appellate Division "upon the law and the facts" and the claim was allowed with costs. The administrator and certain heirs and next of kin of the decedent appealed to this court.

VANN, J. The first question presented relates to our jurisdiction to hear the appeal. As the reversal was upon the facts as well as the law, if there was a material question of fact we cannot consider the action of the Appellate Division in determining it, for we are confined by the Constitution to the review of questions of law. *Matter of Thorne*, 162 N. Y. 238. The court below exercised its appellate jurisdiction by reversing the decree of the surrogate and its original jurisdiction by allowing the claim in controversy, and if either involved the decision of a question of fact we have no jurisdiction of the appeal. *People ex rel. Cornell Steamboat Company v. Dederick*, 161 N. Y. 195; Code Civ. Pro. §§191, 2586 and 2587. The Appellate Division, however, cannot create a question of fact by declaring that there is one and our first duty is to examine the evidence to see whether it presents a material question of fact. If it does our jurisdiction is ended, but if it does not we can review the questions of law duly raised by exception and see whether they authorized the Appellate Division to reverse the decree of the surrogate. *Otten v. Manhattan Railway Company*, 150 N. Y. 395, 401. While there is no conflict in the evidence, if the established facts permit such diverse inferences that one reasonable mind could infer that a controlling allegation was true, while another reasonable mind could infer that it was untrue, a question of fact arises, the determination of which we have no power to review. If, however, the inferences from the uncontradicted evidence all point in one direction, so that no reasonable mind could reach but the one conclusion, there is no question of fact and we are not divested of jurisdiction. The unanimous vote of the judges below has no controlling effect because the findings of the referee and surrogate were not affirmed but were reversed.

Beginning in 1886 the decedent and her sister Angelica each had numerous accounts in the Irving Savings Institution, the greater part in the name of the former individually, or as trustee. At various times there were sixteen of the latter class. While no single account in the name of the decedent ever exceeded \$3,000 the aggregate amount of all her accounts always exceeded that sum and occasionally by several thousand dollars. At the same time many accounts were kept by her in other savings institutions, some in her own name simply and others with the addition of "trustee for" or "in trust for" some person named. It was her practice to draw from all these accounts at will, whether they were kept in her name as trustee or otherwise, and to close them and open others as she saw fit. She kept the pass books and no beneficiary named in any account ever drew therefrom except upon drafts signed by her. When she died intestate in March, 1900, accounts were outstanding in her name as trustee in favor of Emile R. Lattan and three other persons and they had the benefit thereof without controversy.

On the 2nd of January, 1886, the decedent opened an account in the Irving Savings Institution by depositing the sum of \$355. A rule of the bank required the depositor to give the name of the person for whom he wished to place the money in trust, but the one making the deposit had absolute control of the account so long as he retained possession of the pass book. The pass book was numbered 42,728 and the deposit was entered thereon as well as on the books of the bank as an account with Fanny A. Lattan, trustee for Emile R. Lattan, depositor. At some time, but it does not appear when except that it was prior to May, 1893, the words "Trustee for Emile R. Lattan" were canceled by rulings in red ink. As at first entered in the ledger of the bank the account stood as at first entered on the pass book, but when carried forward to a new ledger in 1892 it stood as an account with the decedent individually. When she opened this account she had between \$6,000 and \$7,000 standing in her name individually and as trustee on the books of the same bank. Two other deposits were made in this account, the first of \$5.10 on July 1st, 1886, and the second of \$740, September 21st, 1886. Twelve drafts were drawn against it at various times. The first, dated January 27th, 1886, for \$100 in favor of Lewis H. Lattan, was signed by the decedent as trustee, but all the rest, commencing with September 19th, 1890, were signed

by her individually. July 8th, 1898, the account was closed by her individual draft for \$1,104.06 and the pass book was surrendered. With the amount thus drawn she opened two new accounts in the same bank, the first No. 66,807 in favor of Fanny A. Lattan in trust for Rosalie M. Beam for the sum of \$552.03, and the other No. 66,808 in favor of Fanny A. Lattan in trust for Emile R. Lattan for the same amount. Both of these accounts remained open at the time of the decedent's death and the pass books were delivered by her administrator to the parties named who drew the money accordingly. During the existence of account No. 42,728 the decedent at all times had possession of the pass book and Emile R. Lattan received no part of the moneys deposited to the credit of that account except as already mentioned.

On the 19th of September, 1890, the decedent had ten accounts amounting to between \$8,000 and \$9,000 standing in her name, individually or as trustee, on the books of the Irving Savings Institution. On that day she opened account No. 51,556 in that bank by depositing \$462.03 in her name as trustee for Emile R. Lattan. Said amount was largely made up of sums drawn from other accounts in her name as trustee. She retained possession of the pass book, and no one, except herself and the officers of the bank, appears to have known of the existence of the account until after her death. September 19th, 1892, she deposited \$100 in that account and September 13th, 1893, the further sum of \$80.60. When it was closed on the 15th of November, 1894, it amounted with interest to \$733.30, which she drew out and deposited in another account, in her name as trustee for Lewis H. Lattan, who after her death drew the amount thereof.

Emile R. Lattan was the son of Lewis H. Lattan, a spendthrift, who in 1884 turned over to his sisters Angelica Lattan and the decedent all his property, worth about \$20,000, for their management, but without instructions as to their course in managing the same. No accounting was ever made to him with reference thereto, although he survived them both.

There was no evidence that the decedent ever spoke to any one about any of these accounts or stated what her intention was in opening them. The accounts in question were opened with her own money and no part thereof came from her brother Lewis. Out of thirty-one accounts in seven savings banks she paid over to the alleged beneficiaries the balance left when

two thereof were closed, but in both of these instances, as well as in all other cases, she treated the accounts as her own, drawing against them and making new deposits from time to time as she thought best. All the pass books with a trust heading, containing accounts which had not been closed when the decedent died, were delivered to the respective beneficiaries who drew the balance on hand. Emile R. Lattan did not know of the existence of any accounts on which he relies in this proceeding until more than a year after the decedent died. Angelica Lattan, who was appointed and qualified as administratrix, died on the 10th of April, 1901, leaving the administrator as the sole representative of the estate. The personal property of Fanny A. Lattan was inventoried at the sum of \$32,950.08, but owing to increase in values the amount on hand at the date of the final decree of distribution was more than \$40,000.

The most favorable view of these facts and others of like character not mentioned does not permit the inference as matter of fact that the decedent in making the deposits in question intended to establish an irrevocable trust in favor of the respondent. Aside from what took place when the deposits were made, every act of the decedent, with one exception, is opposed to the theory of a trust. That exception is the closing of one account after the words of trust had been canceled and the deposit of part of the proceeds in the same form as the original. This is not enough when considered with the other facts to establish an irrevocable trust. *Cunningham v. Davenport*, 147 N. Y. 43. No connection was shown between any deposit and the sum held in trust by the decedent and her sister Angelica for Lewis H. Lattan, who is still living and was sworn as a witness at the trial. A deposit in favor of the son would not have satisfied the claim of the father in the absence of a request from the latter, of which there was no evidence. In view of the practice of the decedent in doing business with savings banks, the custom of many other persons in that regard, the various objects which people have in making deposits in the form of a trust, the retention of the pass book with the corresponding control of the deposits according to the rules of the bank, the subsequent history of the various accounts with the frequent withdrawals and changes, we think that the form of the deposits as they appear upon the books was not strengthened by the other evidence. There was no question of fact in the case and the Appellate Division had no power to reverse upon

the facts. We find no exception in the record warranting a reversal upon the law, unless the exception to the conclusion of the referee and surrogate that the claim should be dismissed upon the merits raises reversible error. This involves the question whether upon the conceded facts, as matter of law, an irrevocable trust was established.

Savings bank trusts, as they are sometimes called, have frequently been before the courts during the past few years. When we considered the pioneer case but few instances of deposits in trust were known and a liberal rule was laid down without the limitations which later cases required. After a while when it became a common practice for persons to make deposits in that form, in order to evade restrictions upon the amount one could deposit in his own name and for other reasons, the courts became more conservative and sought to avoid unjust results by adapting the law to the customs of the people. A brief review of the cases will show how the subject has been gradually developed so as to accord with the methods of the multitude of persons who make deposits in these banks.

The case of *Martin v. Funk*, 75 N. Y. 134, arose more than a quarter of a century ago when savings bank trusts were in their infancy. A lady had made a deposit of her own money to the amount of \$500 in a savings bank, declaring that she wished the account opened in trust for the plaintiff, a distant relative. Entry was made accordingly on the books of the bank and on the pass book, which was delivered to the depositor and retained by her until her death. At the same time she deposited a like amount in the same manner in trust for a sister of the plaintiff. No change was made in either account except that the depositor drew out the interest for one year and no other act or declaration bearing on her intention was shown. Neither the plaintiff nor her sister knew anything of either deposit until the depositor died nine years after the account was opened. It was held that a trust was created and that the plaintiff was entitled to the money standing to the credit of the account. . . .

While we have considered we do not cite the numerous cases decided by the Supreme Court bearing upon the question, owing to the conflict in the opinions of learned justices in different appellate divisions. It is necessary for us to settle the conflict by laying down such a rule as will best promote the interests of all the people in the state. After much reflection upon the subject, guided by the principles established by our former

decisions, we announce the following as our conclusion: A deposit by one person of his own money, in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the pass book or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor. This rule requires us to reverse the order of the Appellate Division and to affirm the decree of the surrogate, with costs to the appellants in all courts.

PARKER, Ch. J., O'BRIEN, BARTLETT, MARTIN, CULLEN and WERNER, JJ., concur.

*Order reversed, etc.*¹

¹ See *Matthews v. Brooklyn Sav. Bk.*, 208 N. Y. 508.

Under the doctrine of *Re Totten*, the trust presumptively becomes irrevocable if and when the depositor delivers the bank book to the beneficiary. *Matter of Davis*, 119 N. Y. App. Div. 35; *Stockert v. Dry Dock Sav. Inst.*, 155 N. Y. App. Div. 123. (But such delivery presumptively does not give a legal title to the beneficiary. *Hemmerich v. Union Dime Sav. Inst.*, 205 N. Y. 366.) Communication of the trust to the *cestui que trust* also presumptively makes it irrevocable even though the bank book is not delivered. *Matter of Pierce*, 132 N. Y. App. Div. 465. An intention of the depositor to make the trust irrevocable may be shown by other evidence. *Fowler v. Gowing*, 152 Fed. 801. As to the admissibility of evidence of declarations of the testator as to his intention, see *Tierney v. Fitzpatrick*, 195 N. Y. 433. See Bogert, *Creation of Trusts by Means of Bank Deposits*, 1 Cornell L. Quar. 159; Brady, *Bank Deposits*, pt. 1.

In *Nicklas v. Parker*, 71 N. J. Eq. 777, the court condemned the doctrine of *Re Totten*, as violating the statutes of wills. See 14 Yale L. J. 315.

In Massachusetts, in the absence of notice to the beneficiary, a declaration of trust is insufficient to give the intended beneficiary any interest, no matter how clear the intention of the declarant may be. *Clark v. Clark*, 108 Mass. 522; *Cleveland v. Hampden Sav. Bk.*, 182 Mass. 110; *Boynton v. Gale*, 194 Mass. 320 (notice to parent of infant *cestui que trust* held not enough). The rule seems otherwise as to transfers in trust. *Bailey v. Wood*, 211 Mass. 37, 42.

But by the great weight of authority, notice to the *cestui que trust* is unnecessary, if there is sufficient evidence of an intention to create a trust. *Ames*, 233n.; *Perry, Trusts*, secs. 82n., 97n., 105; 12 Ann. Cas. 167.

BULLEN v. STATE OF WISCONSIN.

SUPREME COURT OF THE UNITED STATES. 1916.

240 U. S. 625.

HOLMES, J. This is a proceeding to fix the inheritance tax upon the estate of George Bullen, deceased, a resident of Wisconsin. The Supreme Court of the State affirmed a judgment for a tax upon a fund of nearly a million dollars which the heirs and the next of kin say cannot be taxed in Wisconsin without violating the Fourteenth Amendment and the contract clause of the Constitution of the United States. 143 Wisconsin, 512.

The facts are simple. Bullen formerly had lived in Chicago and continued to do some business there after moving to Wisconsin, which he did in 1892. He kept in Chicago the bonds, stocks and notes constituting the fund and in 1902 conveyed them to the Northern Trust Company of that City upon certain trusts. In 1904 by virtue of powers reserved he repossessed himself of the fund, but in 1907 he conveyed it to the company upon the former trusts, again. The limitations, so far as material, were of relatively small sums to a sister and niece residing in Massachusetts, and, subject to those gifts, of one-third of the income to his widow for life and the rest of the income and the principal to his four sons. But the instrument contained the following clause: "Fifth. I, the donor, expressly reserve the right to direct and control the disposition of the said trust property and estate, to revoke and vacate this trust at any time during my life, to enter into and upon and take possession of the same, or any part thereof, to require a reconveyance to me of the said trust property, or any part thereof, and to dispose of it as I may see fit. During my lifetime the principal and income shall be used for such beneficiaries and in such manner as I may from time to time appoint, and in default of any appointment during my lifetime, and, at all events, after my death, the said income and the said principal shall be applied, paid over or held as herein provided." It also declared that no portion of principal or income should be paid under some of the leading clauses before Bullen's death unless by his direction. In fact he received the whole income during his life. The Supreme Court held that an inheritance tax was due in respect of the whole fund as upon a transfer intended to take effect in enjoyment after the donor's death.

The deeds of trust were not a merely simulated transaction. Bullen made a will shortly after the first transfer, which was of similar tenor but which, it is found, "has not been probated," perhaps because the parties relied upon the deeds. The deeds transferred title and they had a purpose. Bullen at the time was suffering from locomotor ataxia, his wife also was in precarious health and the chief instrument contemplated the possible disability of both. The ultimate limitations would operate unless revoked, which they were not. But Bullen, as has been seen, reserved an absolute power of control over all of his gifts and exercised it during his life by a revocation, (followed, to be sure, by a reconveyance upon the same terms), and by taking all the income of the fund. The words of Lord St. Leonards apply with full force to the present attempt to escape the Wisconsin inheritance tax, "To make a distinction between a general power and a limitation in fee, is to grasp at a shadow while the substance escapes." Sugden, Powers, 8th Ed., 396. See Gray, Perpetuities, §526b, 1st Ed., pp. 334, 335. We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law. What we do say is that the Supreme Court of Wisconsin was fully justified in treating Bullen's general power of disposition as equivalent to a fee for the purposes of the taxing statute, that there is no constitutional objection to its doing so, and that although Illinois also has taxed the fund, as it might, we are not aware that it has attempted to qualify the effect that Wisconsin has given to the power, and do not intimate that it could have done so, if it had tried. See *Hawley v. Malden*, 232 U. S. 1, 13. . . .

*Judgment affirmed.*¹

¹ See *People v. Kelley*, 218 Ill. 509; *Matter of Dana Co.*, 215 N. Y. 461; 28 Harv. L. Rev. 334; *Blakemore & Bancroft, Inheritance Taxes*, 882.

Under the early English statutes as to legacy duties, a transfer by A to trustees for A for life and for others in remainder with a power to revoke reserved to A, was not subject to a legacy duty. *Tompson v. Browne*, 3 Myl. & K. 32. See Sugden, Powers, 8 ed., 213. But such a transfer is taxable under the more recent English statutes taxing successions. *Hanson, Death Duties*, 6 ed., 476, 620, 671.

As to the effect of a devise or bequest intended to be upon a trust not declared in the will. see Chap. IV, see III, *post*.

CHAPTER III.
THE ELEMENTS OF A TRUST.

SECTION I.

The Subject-Matter of a Trust.

GRAVES v. GRAVES.

CHANCERY, IRELAND. 1862.

13 Ir. Ch. 182.

WILLIAM GRAVES, by his will, devised certain real and personal property to trustees upon trust, amongst other things, to pay to his wife an annuity of 100*l.* a-year for life, in addition to her jointure; and also to pay to his sister an annuity of 50*l.* a-year for life. The will then contained the following passage: "And I do hereby declare it to be my earnest wish that my said sister shall reside at Gravesend with my dear wife, during her life." The testator devised his house at Gravesend, with the household furniture, &c., to his wife for life. Mr. Graves died in 1853. Misunderstandings having arisen between Mrs. and Miss Graves, they, in 1853, ceased to live together; and the petition in this cause was filed by Miss Graves, praying a declaration of her right to reside at Gravesend during her life, and to be boarded by Mrs. Graves.

THE LORD CHANCELLOR [BRADY]. There can be no doubt that an expression of the testator's wish may attach on the property devised by him, and may be enforced by this court; but we are always bound to consider the subject-matter to be effected, and to see what the testator really intended to be done.

Had this expression of wish been attached on any property, as upon a house, it would be one thing; as, if he had said "I wish that my sister should reside in my house at Gravesend," it might be said that this gave her a right to have a portion of the house allotted to her. Those, however, are not the words of the present will, which says, "I declare it to be my earnest wish that my said sister shall reside at Gravesend with my dear wife during her life." What does that mean? It means, if anything,

that they should reside together. He intends, with respect to both, for the sake of mutual society and comfort, that they should pass their lives together. I should hesitate long before saying that this was a trust which this court would enforce. The right of maintenance is given up; but if it were not, could this court be called on to say which was right and which was wrong, in their misunderstanding, or to say that they were to be compelled to spend their time together? The will, however, in my opinion, does not point to residence as property in the house, but to residence with Mrs. Graves as a member of her family. I cannot give an equivalent. An equivalent would destroy a part of the bequest, the intention of which was to give to each from the other the benefit of society and intercourse. I cannot say that a residence, or payment for one, would be an equivalent; and if these ladies cannot agree to live together on friendly terms, I cannot compel them.

GREEN v. FOLGHAM.

CHANCERY. 1823.

1 Sim. & St. 398.

IN 1791 William Singleton was possessed of a recipe for making an ointment called "Dr. Johnson's Ointment for the Eyes," the contents of which were known only to himself; and in the month of September in that year, upon the treaty for the marriage of his daughter Selina with Timothy Folgham, it was agreed that the ownership of the ointment, and the recipe, should be settled, after the decease of Singleton and his wife, for the benefit of Folgham and his intended wife, and their issue, in the manner after mentioned. Accordingly, by an indenture dated the 12th of September 1794, and made between Mr. and Mrs. Singleton of the first part, Mr. and Mrs. Folgham of the second part, and three trustees, of whom the defendant Church was the survivor, of the third part, in pursuance of the agreement, and in consideration of the marriage which had then lately taken place, Singleton assigned to the trustees the proprietorship of the medicine, upon trust for Singleton and his wife, during their lives, and the life of the survivor of them; and after the survivor's decease, upon trust for Selina Folgham, for her life, for her separate use; and after her decease, upon trust for Folgham for his life; and it was declared, that if at the

decease of the survivor of these four persons there should be more than one child of Folgham and his wife, the trustees should sell the ownership of the ointment, and the money arising from the sale should be laid out by the trustees in their names, on government or real securities, for the benefit of such children, in equal shares, and to be transferred to them at the usual periods. And Mr. and Mrs. Folgham covenanted, that if any of their children should survive them, they should discover to one or more of them the method of making the ointment.

Mr. Singleton survived his wife and Mr. Folgham; and on his death the recipe was delivered to Mrs. Folgham. She, assisted by the defendant, William Singleton Folgham, one of her sons, made and vended the ointment until about six months before her death; when, having previously communicated to him verbally the secret of making the ointment, she retired into the country, and left him in the entire management of the concern. In Jan. 1816 Mrs. Folgham died, leaving issue the plaintiff, Selina Elizabeth Green, (who afterwards married the plaintiff Stephen Green), the defendant William Singleton Folgham, and three other children, all of whom were then infants. The recipe was not found after Mrs. Folgham's death, and it was therefore believed that she had destroyed it. In March 1816, William Singleton Folgham came of age; when Church, the surviving trustee, conceiving that it would be more beneficial to the parties interested, that W. S. Folgham should make up and vend the ointment according to his mother's instructions, for the benefit of himself and his brothers and sisters, than that the secret should be sold, an indenture, dated the 22d day of June 1816, was made between W. S. Folgham of the one part, and Church, and one Hall, of the other part; by which, after reciting that the secret of making the ointment had been communicated to W. S. Folgham by his mother, for the benefit of himself and his brothers and sisters, W. S. Folgham covenanted to make up and sell the ointment, and twice in every year to pay to Church and Hall four fifths of the clear profits, after deducting 25*l.* per cent. yearly from the gross amount of the sales, for his trouble. And it was declared that Church and Hall should stand possessed of the four fifths of the profits, in trust for Mr. and Mrs. Folgham's other children.

W. S. Folgham made up and sold the ointment, and disposed of the profits according to the provisions of this deed. In March 1817, Mrs. Green came of age; and on the 17th of Sep-

tember in that year, she, at W. S. Folgham's request, signed an agreement to transfer to him all her interest in the ointment, in consideration of his paying an annuity of 100*l.* to her, and to the plaintiff Stephen Green (to whom she was then about to be married) for their lives; and on the 22d of the same month she also, at W. S. Folgham's request, executed a deed-poll confirming the indenture of the 22d of June 1816.

The bill did not take any notice of the recital before mentioned in the indenture of June 1816; but it charged that the provisions made by that indenture for the plaintiff Mrs. Green, and the other younger children whilst they were under age, was very disadvantageous to them: That Church and Hall acted in concert together, and had imposed upon them in respect of the provisions of that deed: That Mrs. Green was imposed upon by W. S. Folgham in respect of the deed-poll of September 1817; That she was ignorant of its contents when she executed it: That it was obtained from her by Fraud: That the Annuity of 100*l.* a year was a grossly inadequate consideration for the share of the profits of the ointment to which she was entitled under the settlement: That W. S. Folgham held the proprietorship of the ointment subject to the trusts to the settlement: That those trusts ought to be performed, and the ownership of the ointment sold, as directed by that instrument.

The bill prayed, that the deeds of June 1816, and September 1817, and the agreement, might be declared fraudulent and void, and be delivered up to be cancelled: That the trusts of the settlement of September 1794 might be performed: That an account might be taken of the quantities of the ointment sold since Mrs. Folgham's death, and of the monies produced by the sale: That one fifth of the profits might be paid to the trustees of Mr. and Mrs. Green's marriage settlement, and three fifths be placed out at interest for the benefit of the three other younger children: That the ownership of the ointment might be sold, and the proceeds applied according to the trusts of the settlement; and that W. S. Folgham might be restrained from divulging the method of preparing the ointment.

W. S. Folgham, by his answer, said, that the existence of the settlement was not known to him until long after he had been in possession of the secret of preparing the ointment: That his mother communicated the secret to him without imposing any conditions on him, or stating that any other person was to partake of the profits of the ointment; and he

submitted whether, under these circumstances, his brothers and sisters took any interest in the ownership of the ointment under the trusts of the settlement, and whether he was bound by the provisions thereof. He admitted that he came of age on the 20th of March 1816; and that, having become acquainted with the contents of the settlement, he was desirous that his brothers and sisters should partake of the profits of the ointment; and that he accordingly executed the indenture of June 1816; and he submitted that that deed, having been made for the interest of all the infants, ought not to be disturbed. He said that he had devoted his whole time and attention to the conduct of the business, and was brought up with the full expectation of having the profits for his provision; and that, in order to assist his mother in the business, he had given up a situation which he had filled for five years; and that, in the course of conducting the business, he had been obliged to forego many advantageous opportunities of advancement in other pursuits; and he denied all the allegations in the bill as to the deed-poll and agreement having been obtained from Mrs. Green by fraud or surprise, and as to the annuity of 100*l.* being an inadequate consideration for her share of the profits of the ointment.

The cause now came on to be heard on the bill and answer.

THE VICE-CHANCELLOR [SIR JOHN LEACH]. It was stated, at the bar, that the defendant, W. S. Folgham, was a purchaser of this secret for a valuable consideration, without notice of the settlement; but no such case is made in his answer. And, after the admission made by him in his answer that he voluntarily considered himself as a trustee for the marriage settlement, and after the execution of the deed of June 1816, which is not impeached, he cannot successfully assert a personal title to this secret.

By the terms of the marriage settlement the trustees were directed to sell this secret upon the death of Selina Folgham; and, having no authority to deal with this subject as they have in fact dealt with it by the deed of June 1816, that deed is merely void against the younger children, who were all then infants. The subsequent agreement of September 1817, by which Selina Green engaged to assign her interest in the secret to the defendant for the annuity therein stated, being abandoned at the bar, is now out of the question. The defendant, W. S. Folgham, being to be considered therefore as a trustee of this secret under

the settlement, the first relief to which the plaintiffs are entitled is, that he should come to an account for the profits actually made by him since the death of his mother, from the sale of the ointment, having a reasonable allowance made to him for his time and trouble in preparing and vending the same. If this secret could be made a subject of sale, the plaintiffs would be next entitled to ask from the court that a sale should be directed accordingly. But, inasmuch as the court has no passible means either to communicate this secret to a purchaser with certainty, or to protect him in the enjoyment of it, a sale becomes impracticable. But although the court cannot direct a sale, it has the power of taking a course which, in point of advantage, will be equivalent to the plaintiffs. It can inquire what would be the value of this secret to sell, provided it could be made the subject of sale; and the annual profits which have actually been made by the sale of the ointment from the death of the mother will be a fair criterion by which that value may be estimated. I think that this value is more fit for the consideration of a jury than of the Master; and, after decreeing the account of the profits from the death of the mother, in the manner which I have stated, I shall direct the parties to proceed to an issue at law, in order to try what, at the date of this decree, was the pecuniary value of the secret for the preparation of the ointment in the pleadings mentioned, called, "Dr. Johnson's Ointment for the Eyes, or the Golden Ointment." The circumstances, that the plaintiff Selina Green's interest in the secret is made the subject of her marriage settlement, and that one or more of Mrs. Folgham's children are still infants, are not material for present consideration.

*Let further directions and costs be reserved.*¹

KERR v. CRANE.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1912.

212 Mass. 224

BILL IN EQUITY, filed in the Supreme Judicial Court on May 23, 1910, and afterwards amended, in which it was alleged that the defendant New England Order of Protection, a Massachusetts fraternal beneficiary corporation, issued to one of its members,

¹ Cf. *Chadwick v. Covell*, 151 Mass. 190; *Eastman Co. v. Reichenbach*, 20 N. Y. Supp. 110.

one Merritt B. Crane, a benefit certificate, that the defendant John W. Crane, a cousin of the member, was named the beneficiary therein under an agreement between him, Merritt B. Crane and the plaintiff, that he would pay the proceeds of the certificate after the death of Merritt B. Crane to the plaintiff. Merritt B. Crane having died and John W. Crane refusing to collect the amount due on the certificate and pay it to the plaintiff, the bill prayed that he should be compelled to do so.

The widow, a brother and the children of a deceased brother of Merritt B. Crane were allowed to intervene as defendants.

The case was heard by Braley, J., who filed a memorandum of his findings. The facts are stated in the opinion. A decree was entered for the plaintiff; and the defendants appealed.

SHELDON, J. The findings made by the single justice were well warranted and cannot be reversed. The case must be decided upon those findings.

The benefit certificate taken by Merritt B. Crane in the defendant order could not have been made payable to the plaintiff, who came within none of the classes named in the statute or in the "general laws" of the order. R. L. c. 119, §6.¹ *Massachusetts Foresters v. Callahan*, 146 Mass. 393. *Marsh v. American Legion of Honor*, 149 Mass. 512. *Lavigne v. Ligue des Patriotes*, 178 Mass. 25. Nor could he acquire any rights in the certificate or its proceeds from any subsequent directions or assignment made in his favor by the insured, *Briggs v. Earl*, 139 Mass. 473, or by reason of the affectionate relations between himself and the member or by reason of his having paid assessments and dues for which the member was liable. [Cases cited.] It is therefore the right and the duty of the defendant order to pay the amount of the certificate to the beneficiary named therein, the defendant John W. Crane.

The real claim of the plaintiff is against the last named defendant, upon the ground that a trust has been created in the plaintiff's favor and impressed upon the proceeds of the certificate, by which the beneficiary of the certificate is bound to receive

¹ "Such death benefit shall be payable only to the husband, wife, betrothed, child by legal adoption, parent by legal adoption, or relatives of, or persons dependent upon, the member named in the benefit certificate. . . . If a benefit certificate has been lawfully issued and the beneficiary therein named and the husband, wife, etc., have all died, the member with the consent of the officers of the corporation, . . . may have any other person substituted as beneficiary therein."

and hold its proceeds for the benefit of the plaintiff and to turn them at once over to him. To create such a trust and to bind the beneficiary to the performance thereof, the insured member delivered the certificate to the plaintiff, and arranged that the latter should pay the assessments to become due thereon and also make a small monthly payment to the member himself. The member also informed the beneficiary John W. Crane of this his desire, of his arrangement with the plaintiff, and of his wish that John should pay the proceeds of the certificate, when collected, to the plaintiff. John orally assented to this. A written memorandum was also prepared and signed by the insured member, his wife and his nearest blood relations, and by John, the beneficiary. And the single justice has found that this beneficiary "understood that he was not to receive the proceeds for his own use," but that he "agreed to collect and hold the proceeds for the use of the plaintiff." Unless this arrangement and the trust which resulted therefrom are invalid, or are not to be enforced by reason of the circumstances of the case, we are satisfied that it did create a duty on the part of John W. Crane to recognize the rights of the plaintiff as entitled to this fund when it should have been collected, and to pay the same at once to him, and that this right of the plaintiff can be enforced in equity. *Kendrick v. Ray*, 173 Mass. 305. *Hewins v. Baker*, 161 Mass. 320. Though not precisely the same, the situation is analogous to those cases in which one has acquired property "by conveyance or devise secured to himself under assurances that he will transfer the property to, or hold and appropriate it for, the use and benefit of another. A trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of the promise he had induced the transfer of the property to himself." *Glass v. Hulbert*, 102 Mass. 24, 39, and cases cited. *Olliffe v. Wells*, 130 Mass. 221, 224, and cases cited. John W. Crane, though already named as beneficiary in the certificate, yet held this position only at the will of the insured member, who at any time could have revoked his designation and appointed another in his stead; and it is an irresistible inference from the facts found that this course would have been taken, and that another beneficiary within the class permitted would have been appointed but for the consent and engagement given by John.

But it is claimed that there was no valid consideration for this

promise and the trust which resulted therefrom. This position however is sufficiently answered by what has been said. The beneficiary retained his position by reason of his undertaking, and that was consideration enough. As in the cases already referred to, it would be a fraud for him to receive and apply to his own use the proceeds which he has been enabled to obtain only by means of his promise to pay them to the plaintiff.

It is said that the interests both of the insured member and of this beneficiary were merely contingent and not actually vested rights of property in an existing fund. That is true. The amount of the benefit might never be realized at all. If it were to be realized, yet the member had no other interest therein than the bare power to appoint some person of a limited class to receive the fund if and when it should become due and payable. The beneficiary had no other interest than a mere expectancy dependent upon the will and pleasure of the insured member. But it does not follow that the holder of such a merely expected or contingent interest, growing or expected to grow out of actually existing, though defeasible, contractual rights, has no power of dealing with it, or that his engagements made with reference to such an interest while it is merely expectant and contingent, may not be enforced in equity after the interest shall have become vested and absolute. And it has been so held with reference to just such contingent and expectant rights as are here in question. *Hirsh v. Auer*, 146 N. Y. 13. *Dexter v. Supreme Council*, 97 App. Div. (N. Y.) 545. *Kimball v. Lester*, 43 App. Div. (N. Y.) 27, affirmed in 167 N. Y. 570. *Jarvis v. Binkley*, 206 Ill. 541. *Peek v. Peek*, 101 Ky. 423. That equitable rights might be attached to the proceeds of such a certificate was recognized by this court in *Mee v. Fay*, 190 Mass. 40, 42.

This disposition cannot be avoided on the ground that it was merely testamentary. *Kendrick v. Ray*, 173 Mass. 305.

The trust was sufficiently executed by the delivery of the certificate to the plaintiff and the promise of the beneficiary to pay the prospective fund to the plaintiff upon its receipt. No doubt all this rested upon a merely contingent foundation and might have been avoided by the member in his lifetime, through the appointment of a new beneficiary; but this was not done, and the rights of these parties are not now affected by that past contingency.

It is a more difficult question whether by the means here presented the benefit of the certificate can be secured to one who is

not a member of the class described in the statute already quoted and in the rules of the defendant order. If the plaintiff claimed merely under the insured member, he could not maintain his claim. It is said that to permit him now to recover would be to allow that to be done by indirection which could not be done directly, and thus to frustrate both the legislative will and the intention of the parties to the contract. On this reasoning it was held in another State that an assignment of such a certificate made by the beneficiary thereof in the lifetime of the insured member and joined in by the latter was invalid. *Rose v. Wilkins*, 78 Miss. 401. It may be granted that a beneficiary association could not be required to make payment to any other persons than those specified in its regulations and in the statutes by which it is governed. The power of the court to deal with the beneficiary, to require him to collect the money that has become due and to pay it out according to the obligations into which he has entered, stands on a different footing. But the existence of even this power has been denied. *Gillam v. Dale*, 69 Kans. 362. In our opinion however there is a fundamental difference between the two propositions. The right of the beneficiary to bind himself by antecedent conduct or agreement as to what he will do with the proceeds of such a certificate when they shall come into his possession, subject only to the contingency of their so coming, is hardly to be denied. His prospective obligation becomes binding only when his contingent interest has become absolute. He has at first only a prospective right, which may never come into existence, but it is a right growing out of a presently existing subject matter, an expectancy which, if there is no change in the present state of affairs and if nothing intervenes to destroy rights which have been stipulated for, is likely in the natural order of events to ripen into a reality, a vested right which will then be capable of enforcement. The right of the beneficiary during the lifetime of the insured member closely resembles the expectation of a farmer to raise a crop which he intends to plant upon his land and which he pledges to obtain the seed therefor; or the expectation of an owner of domestic animals that they will yield a natural increase, about which he may make contracts in advance; or of a dairyman that his cows will yield milk, so that he may properly bargain for the disposing of the butter and cheese which he hopes to make therefrom. *Low v. Pew*, 108 Mass. 347, 350. And see the cases collected in 35 Cyc. 45, 46. It is enough that there is a present interest in the thing from

which the expected article or right is to be directly produced. And even if the actual property does not pass in the future product or result of that which has a present existence, an agreement touching that future product or result may yet have validity and afterwards be capable of enforcement, as was held in the cases cited on page 228 of this opinion.

The beneficiary cannot indeed make a valid assignment of his expectant interest to one not within the limited classes; but as soon as his right has vested and become absolute, it is his property and he may dispose of it at his will. We see no reason why he may not in advance bind himself, at any rate, by the creation of a trust, to make such a disposition as we have here.

What has been said disposes also of the objection that this is an illegal result, an evasion of the statute. It has been found that the parties had no intention to evade the statutes of the Commonwealth or the "laws" of the defendant order. Nor does the accomplishment of their purpose have that effect. The payment of the benefit to the beneficiary is not to be interfered with. The property in that benefit, as between the order and the beneficiary, vests absolutely in the latter. The order is not concerned with the disposition which he may make of it. But it would be grossly inequitable to allow him to set up the legal title which he has acquired, as a means of evading the execution of the trust which he has assumed and by means of which he obtained both his expectant right and his absolute title.

The decree appealed from must be modified by providing that upon the surrender of the certificate the defendant order shall pay the amount thereof to the defendant John W. Crane, and that he shall forthwith pay the same to the plaintiff. The plaintiff should have also costs against the last named defendant.

*So ordered.*¹

¹ *Re Turcan*, 40 Ch. D. 5, *accord*.

If a lessee covenants not to assign his lease, he cannot validly make himself trustee of it. *Ellis v. Small*, 209 Mass. 147.

What may be held in Trust. Purely personal rights cannot be held in trust; e.g. a peerage, an office, and the like. *Buckhurst Peerage*, 2 App. Cas. 1; 1 Gray, Cas. Prop., Chap. IV.

On grounds of public policy there are a few exceptions to the rule that whatever may be transferred may be the subject of a trust; e.g. a homestead entry: *Clark v. Bayley*, 5 Ore. 343. An improvement right: *Smith v. Oliver*, 11 S. & R. 257. Formerly the registered owner of a ship under the English Registry Acts could not be an express trustee of the ship. *Ex parte Yallop*, 15 Ves. 60; *Ex parte Houghton*, 17 Ves. 251; *Camden v. Anderson*, 5 T. R. 709; although in case of fraud he might be a constructive trustee. Holder-

SECTION II.

The Trustee.

PIMBE'S CASE.

— 1585.

Moore 196. — Translated in Cruise, *Uses*, 47.

THROC MORTON committed high treason, 18 Eliz., for which in 26 Eliz. he was attainted by trial. Between the treason and the attainder a fine was levied to him by Scudamore of certain lands to the use of Scudamore and his wife (who was sister to Throckmorton), and of the heirs of the said Scudamore. Afterwards Scudamore and his wife bargained and sold the lands to Pimbe for money. Upon discovery of the treason and the attainder of Throckmorton, the purchaser Pimbe was advised by Plowden, Popham, and many others, that the estate of the land was in the Queen, because the Queen is entitled to all the lands that traitors had at the time of the treason, or after. So the use which was declared to Scudamore and his wife upon the fine was void, by the relation of the right of the Queen under the attainder, and the Queen must hold the land, discharged of the use, because the Crown cannot be seised to a use.¹

ness v. Lamport, 29 Beav. 129. At the present day, however, a registered ship may be the subject of a trust; but the trust cannot be registered. *Chasteauneuf v. Capeyron*, 7 App. Cas. 127. The same rule applies to patents: *Edmunds, Letters Patent*, 503. Trade marks: *Sebastian, Trade Marks* (3d ed.) 108. Shares in English companies: *Buckley, Companies Acts* (6th ed.) 85-87. — AMES.

A *chose* in action may be held in trust by the obligee. *Fletcher v. Fletcher*, 4 Haro 67, *ante*, p. 184. See Chap. I, secs. IV and VIII, *ante*. But not by the obligor. *Re Leaper*, [1916] 1 Ch. 579, *ante*, p. 179. As to a mere expectancy or *spes*, see *Re Ellenborough*, [1903] 1 Ch. 697, *ante*, p. 175.

On the question whether a power of appointment can be held in trust, see Chap. II, sec. I, *ante*, and see Gray, *Powers in Trust and Gifts Implied in Default of Appointment*, 25 Harv. L. Rev. 1.

¹ Similarly, the King could not make a conveyance by bargain and sale. *Atkins v. Longvile*, Cro. Jac. 50; [Bacon, *Uses*, 56.]

The common statement that the crown or a state cannot be a trustee means simply that the *cestui que trust* cannot file a bill in equity against the sovereign. *Dillon v. Fraine*, Poph. 70; *Wike's Case*, Lane 54, 2 Roll. Ab. 780 [C] 1 s. c.; *Paulett v. Atty. Gen.*, Hardres 465, 467; *Kildare v. Eustace*, 1 Vern. 437, 439; *Reeve v. Atty. Gen.*, 2 Atk. 223, 1 Ves. 446 (cited), s. c.; *Penn v. Baltimore*, 1 Ves. Sr. 444, 453; *Burgess v. Wheate*, 1 Eden 177, 255; *Hodge v. Atty. Gen.*, 3 Y. & C. 342; *People v. Ashburner*, 55 Cal. 517; *Shoe-*

It is but justice to mention that, the case being represented to Queen Elizabeth, she, much to her honor, granted the land to the *cestui que use* by patent.

KING v. BOYS.

— . 1569.

Dyer 283 b.

ONE T. King enfeoffed one Jasper Boys, an alien, and Forcet of Gray's Inn, to the use of himself and his wife in tail, remainder to his right heirs. Whether the Queen be entitled to a moiety of the land immediately, or not, was the question. And it seems that if an office be found of it, the Queen shall have the moiety by her prerogative to her own use, and the other use in this moiety is gone forever.¹

maker v. Board, 36 Ind. 175; Briggs v. Light-boats, 11 All. 157, 170-173; Pinson v. Ivey, 1 Yerg. 296, 332. In Farmers' Co. v. The People, 1 Sandf. Ch. 139, the difficulty of procedure seems to have been overlooked.

If the beneficiary sues by petition, the sovereign will, as a matter of course, recognize the just claim of the petitioner. Pimbe's Case, *supra*; Scounden v. Hawley, Comb. 172; Briggs v. Light-boats, 11 All. 157, 170-173. See Rustomjee v. Queen, 2 Q. B. Div. 69. [For an instance of a private act whereby the state released its title to an equitable claimant, see Laws N. J., 1912, c. 230.]

The validity of the trust is recognized also in legal proceedings in which the sovereign is not made a defendant. E. g.: A grantee of the sovereign takes the title subject to the trust. Winona v. St. Paul Co., 26 Minn. 179; Pinson v. Ivey, 1 Yerg. 296; Marshall v. Lovell, Cam. & Nor. (N. C.) 217. And if the sovereign obtains the title to trust property, his title will be barred and with it the claim of the *cestui que trust* by the same lapse of time which would have protected the adverse possession if a private individual had been trustee. Miller v. State, 38 Ala. 600; Molton v. Henderson, 62 Ala. 426. — AMES.

In Yale College, 67 Conn. 237, it was said that the state might act as trustee of a fund to be applied for governmental purposes. The state however declined to act.

¹ Fish v. Klein, 2 Mer. 431; Marshall v. Lovell, Cam. & Nor. 217 (*semble*) accord. [See Sanders, Uses, 85.]

An alien grantee upon trust acquired title defeasible only by the sovereign. Com. Dig. Alien, C. 4; Ferguson v. Franklins, 6 Munf. 305.

The alien's disability was removed in England by St. 33 Vict. c. 14, §2; and by similar statutes an alien may at the present day in almost all jurisdictions hold property as freely as a subject, and may therefore be a trustee. In *Re Hill*, W. N. (1874), 228, the court appointed an alien as trustee of English property for beneficiaries in France. — AMES.

THE ATTORNEY GENERAL *v.* LANDERFIELD.

CHANCERY. 1743.

9 Mod. 286.

NOTE. In this case the Attorney General argued, that as corporations could not be seised to an use at law, no more could they be trustees, but should have the lands to their own use, divested and freed from the trust.¹

But the CHANCELLOR [LORD HARDWICKE] would not let him go on, nothing being clearer than that corporations might be trustees.²

¹ Chudleigh's Case, 1 Co. 122a. See, *accord*, Bro. Ab. Feff. al Uses, 60; Bury *v.* Bokenham, Dy. 7b; Bacon, Uses, 57. But see, *contra*, Holland's Case, 2 Leon. 121, 3 Leon. 175, [holding that a corporation may make a conveyance by bargain and sale. See also Gilbert, Uses, 7]. The reason for the ancient doctrine is thus quaintly expressed in Popham, 72: "Yet every feoffee is not bound although he hath knowledge of the confidence, as an alien person, attain, and the like; nor the King, he shall not be seised to another's use, because he is not compellable to perform the confidence; nor a corporation, because it is a dead body, although it consist of natural persons: and in this dead body a confidence cannot be put, but in bodies naturall." — AMES.

"Bodies politik are not capable of a use or trust, because they are bodies framed at the will of the king, and are no further capable than he wills them: and it is his will that they should purchase for the common benefit, and for the ends of their creation, and not that they should take any thing in trust for others. Besides, being incorporate, the Chancery had no process on the persons to compel them to discharge their trust." 7 Bac. Abr., 6 ed., 94.

² As to the powers and liabilities of trust companies, see Sears, Trust Company Law. This matter is regulated by statute in the several states. By the act of Congress establishing the Federal Reserve Board, that board is given authority "to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe." 38 Stat. L. 251, 262, c. 6, sec. 11(k). This provision is constitutional. First Nat. Bk. *v.* Fellows, 244 U. S. 416. See 15 Col. L. Rev. 386.

As to the power of other private corporations to act as trustees, see Ames, 216n., 1 Machen, Corporations, sec. 57.

As to the power of municipal corporations to act as trustees, see Gloucester *v.* Osborn, 1 H. L. C. 272, 285; Vidal *v.* Girard's Executors, 2 How. (U. S.) 127, 189; Girard *v.* Philadelphia, 7 Wall. (U. S.) 1, 14; Webb *v.* Neal, 5 Allen (Mass.) 575; Boston *v.* Doyle, 184 Mass. 373; *Re Franklin's Est.*, 150 Pa. 437; 3 McQuillan, Municipal Corps., secs. 1128-1139; Dec. Dig., Corps., 434; 6 Harv. L. Rev. 202.

JEVON v. BUSH.

CHANCERY. 1685.

1 Vern. 342.

LORD BELLAMOUNT in 1647 lent 600*l.* to one Gardiner on a recognizance of 1,000*l.*, which he took in the name of the defendant Bush, and intended it as a provision for the plaintiff, his infant daughter, then but two years old; and Bush at the same time executed a declaration of the trust. Gardiner being about to sell his estate, and the purchaser having notice of the recognizance, Bush is prevailed upon in 1654 to acknowledge satisfaction; and in 1657, and not before, the plaintiff had notice of this declaration of trust, and, understanding that Bush had acknowledged satisfaction on this recognizance, brings her bill to be relieved against this breach of trust.

The defendant by answer insisted and it was so proved in the cause, that he was but 18 years old when he made this declaration of trust; and insisted likewise, that he never had one penny for his acknowledging satisfaction on that recognizance, but that Lord Bellamount's widow, as he believes, received the moneys due thereon.¹

The counsel for the defendant insisted, that the plaintiff ought to prove some fraud in the trustee, or that he received to his own use part of the money.

LORD CHANCELLOR [JEFFREYS]. The proof lies on the defendant's side; he ought to discharge himself, and it is not sufficient for him to say he never received any of this money for his own use: there is no doubt but an infant may be a trustee; and the breach of trust was committed in 1654, after he was of full age; and therefore decreed him to pay the principal money, with damages not exceeding 1,000*l.*, being the penalty of the recognizance; and cited my Lord Hobart, who says that *cestui que trust* in an action of the case against his trustee shall recover for a breach of trust in damages.²

¹ The statement of facts has been abridged. See Ames, 217.

² Although an infant may be a trustee, no judicious person and no court would appoint an infant as trustee.

(1) There was formerly no mode of divesting the infant trustee of his title to the trust property. An equity judge could make no other decree against the infant than that which was made in *Anonymous*, 3 P. Wms. 389, n. [A]; namely, "to convey when of age, unless he should shew cause to the contrary

PEGGE v. SKYNNER AND RICHARDSON.

CHANCERY. 1784.

1 Cox. Eq. Cas. 23.

BILL for specific performance of an agreement for a lease from plaintiff to defendants. It was objected that the defendant Richardson had since become incapable of doing any act in consequence of a paralytic stroke. It was ordered that the within six months after he should come of age." See also *Perry v. Perry*, 65 Me. 399; [*McClellan v. McClellan*, 65 Me. 500;] *Whitney v. Stearns*, 11 Met. 319; and compare *King v. Bellord*, 1 H. & M. 343.

The first remedial statute was passed in 1708, St. 7 Anne, c. 19, which was followed by St. 6 Geo. IV. c. 74, §2. But these statutes applied only to bare, express trustees. *Ex parte Vernon*, 2 P. Wms. 549; *Goodwyn v. Lister*, 3 P. Wms. 387; *Hawkins v. Obeer*, 2 Ves. 559; *Atty. Gen. v. Pomfret*, 2 Cox Eq. 221; *Ex parte Beddam*, 1 Rose 310; *Bullock v. Bullock*, 1 J. & W. 603; *King v. Turner*, 2 Sim. 545, 549; *Re Moody*, Tamlyn 4. [Cf. *Gray v. Bell*, 41 L. T. (N. S.) 521; *Mellor v. Porter*, 25 Ch. D. 158.] But by the Trustee Act of 1850, 12 & 13 Vict. c. 74, §7, the title of an infant trustee may by the Court of Chancery be vested in a suitable person, whether the trust be express or constructive, and whether the trustee is a bare trustee or has a beneficial interest. There are similar statutes in this country. *Hawthorn v. Root*, 6 Bush 501; [*Walsh v. Walsh*, 116 Mass. 377;] *Bridges v. Bidwell*, 20 Neb. 185; *Re Follen*, 14 N. J. Eq. 147; *Owens v. Owens*, 23 N. J. Eq. 60; *Livingston v. Livingston*, 2 Johns. Ch. 537; *Thompson v. Dulles*, 5 Rich. Eq. 370. Such statutes have of course no extra-territorial force. *Sutphen v. Fowler*, 9 Paige 280.

Independently of these statutes, if an infant trustee actually conveyed to the *cestui que trust*, or according to his directions, he could not, on attaining majority, disaffirm the conveyance. — *v. Hancock*, 17 Ves. 383; *Elliott v. Horn*, 10 Ala. 348; *Starr v. Wright*, 20 Oh. St. 97; *Thompson v. Dulles*, 5 Rich. Eq. 370. [In *Levin v. Ritz*, 17 N. Y. Misc. 737, where an infant held a *chose* in action in trust, it was held that the *cestui que trust* could compel the obligor to make payment directly to him.]

(2) An infant, it is obvious, has not the discretion requisite to the due administration of a trust, and cannot be held accountable for its maladministration. *Russell's Case*, 5 Rep. 27a; *Whitmore v. Weld*, 1 Vern. 326; *Hindmarsh v. Southgate*, 3 Russ. 324; *Stott v. Meanock*, 31 L. J. Ch. 746; in which cases it was adjudged that an infant executor was not liable for a *devastavit*.

Although an infant is not liable for a breach of trust, he is chargeable *ex delicto* as a constructive trustee for any property acquired by his misconduct. *Anon.*, 2 Eq. Ab. 489, n. (a); *Eason v. Nicholas*, 1 DeG. & Sm. 118, n.; *Clare v. Watts*, 9 Vin. Ab. 415; *Anon.*, 2 Eden, 71, 72; *Overton v. Banister*, 3 Hare 503; *Lemprière v. Lange*, 12 Ch. D. 675. [See *Cory v. Gertchen*, 2 Madd. 40.] — AMES.

An infant who embezzles money is liable in an action for money had and received. *Briston v. Eastman*, 1 Esp. 172.

defendant Skynner should execute a counterpart of a lease, and also the defendant Richardson, when he should be capable of so doing.¹

LORD THURLOW refused to give plaintiff costs.

MARRIED WOMEN. A married woman may be a trustee. *Curran v. Green*, 18 R. I. 329. In the absence of legislation however she cannot convey the title to the trust property without the co-operation of her husband. But by statute both in England and almost everywhere in this country a *feme covert* is independent of her husband in her dealings with trust property. In the absence of statute, liability for any breach of trust falls not upon her but upon her husband. This also has been largely changed by statute.

As to the powers and liabilities of married women as trustees, see Ames 220n.; 1 Perry, Trusts, secs. 49-51.

WOODRUFF v. WOODRUFF.

COURT OF CHANCERY, NEW JERSEY. 1888.

44 N. J. Eq. 349.

PATRICK WOODRUFF died in December, 1886, leaving a daughter, Louisa C. Woodruff, his only child, him surviving. He died testate, having by his will appointed his daughter, Louisa, and one Charles P. Stratton, the executrix and executor thereof, and having also by it devised to Charles P. Stratton, in fee, the farm "Oaklands," and bequeathed to him other

¹ *Owen v. Davies*, 1 Ves. 82; *Hall v. Warren*, 9 Ves. 605, *accord*. [See Ames, Cas. Eq. Juris. 6.]

Apart from statutes, the only decree that could be made against a trustee *non compos mentis* was in the form indicated in the principal case. The difficulty was removed in England in 1731, in the case of express, bare trustees, by St. 4 Geo. II. c. 10, and St. 6 Geo. IV. c. 74, §3. But the old rule continued as to constructive trusts and trusts in which the trustee had an interest. *Ex parte Tutin*, 3 V. & B. 149; *Ex parte Currie*, 1 J. & W. 642. But by the Trustee Act of 1850, §3, the Equity judges were authorized to vest the title of a lunatic trustee in a suitable person, whether the trust was constructive or express, and whether the trustee was a bare trustee or beneficially interested. See also the Lunacy Act of 1890, §§135, 136. There are similar statutes in this country. *Re Wadsworth*, 2 Barb. Ch. 381; *Swartwout v. Burr*, 1 Barb. 495.

A lunatic trustee is, of course, not liable for a breach of trust. — AMES.

property upon trust. . . . The trustee, Charles P. Stratton, died during the life of the testator. . . . The bill prays (1) that a trustee may be appointed in the place of Charles P. Stratton, to execute the trust.¹ . . .

THE CHANCELLOR [MCGILL]. . . . As Mr. Stratton, to whom the lands were devised in trust, died before the testator, the title to the farm descended to Louisa C. Woodruff as heir-at-law of her father, Patrick, but charged with the trust established by the will. Lewin on Trusts (8th ed.) 833; Perry on Trusts, §38. From the character of that trust, it seems to me that a trustee should now be appointed in the place of Mr. Stratton. I will order a reference to a Master, to ascertain who will be a fit and proper person to receive the appointment, and what security the person selected should be required to give. I will appoint a new trustee. . . .

SONLEY *v.* THE MASTER, &c., OF THE
CLOCK-MAKERS COMPANY.

CHANCERY. 1780.

1 Bro. Ch. 81.

CONYERS DUNLOP devised freehold estates to his wife for life, remainder to his brother Charles in tail male, remainder to the Clock-makers Company, in trust that they should, as soon as conveniently might be after the decease of his wife and brother Charles without issue male, or after the death of such issue under the age of twenty-one years, sell the premises, and that the money to arise from such sale, and the receipts and profits from the decease &c. till the sale, should be divided among all and every the testator's nephews and nieces already born, or to be born, and their child or children begotten, or to be begotten, to wit, &c. The testator's wife and brother both died in his lifetime. The question therefore was, whether the devise to the corporation being void,² the heir at law took beneficially, or subject to the trust.

MR. BARON EYRE. Although the devise to the corporation be void at law, yet the trust is sufficiently created to fasten itself

¹ The statement of facts is taken from the opinion of the Chancellor, and a large part of the opinion is omitted.

² By Stat. 34 & 35 Hen. VIII. c. 5.

upon any estate the law may raise. This is the ground upon which courts of equity have decreed, in cases where no trustee is named.

Decreed that the heir at law is a trustee to the uses of the will.¹

HILES v. GARRISON.

COURT OF CHANCERY, NEW JERSEY. 1906.

70 N. J. Eq. 605.

BERGEN, V. C. The bill in this case is filed by the complainant, widow of Richard Hiles, deceased, for the construction of his last will and testament, and the appointment of a trustee to execute such trusts as may be determined are established by such will. As the relief sought is the appointment of a trustee, and the necessity for such appointment requires the construction of the will as an incident to the relief sought for, the complainant is properly here.

The pertinent part of the will is the second clause, which reads as follows:

"I do devise that all my property and bonds and mortgages be put in a trust, and the income be divided equally between my brother, Biddle Hiles, and sister, Caroline Garrison, and my wife, as long as she remains my widow, in case of her marring or deth her share to gowe to my brother Biddle Hiles, and my sister Caroline Garrison."

The testator died possessed of considerable estate, the personal having been appraised at the sum of \$54,039.88. His real property consisted of an undivided interest in certain real estate in the county of Salem, in this state, such interest being estimated by the parties in interest at something over \$20,000. At the time of his death the only next of kin of the testator was his brother, Biddle, and his sister, Caroline. The will was prepared by the testator, and does not clearly express his desires, and the purpose of this cause is to ascertain whether a trust

¹ Anon., 2 Vent. 349; *Farmers' Co. v. Chicago Co.*, 27 Fed. Rep. 146; *Vidal v. Girard*, 2 How. 127; *Walker v. Walker*, 25 Ga. 420; *Hoeffler v. Clogan*, 171 Ill. 462; *Byers v. McCartney*, 62 Iowa 339; [*Amer. Bible Soc. v. Amer. Tract Soc.*, 62 N. J. Eq. 219;] *Jackson v. Hartwell*, 8 Johns. 422; *Sheldon v. Chappell*, 47 Hun 59; *Frazier v. St. Luke's Church*, 147 Pa. 256; *White v. Baylor*, 10 Ir. Eq. R. 43, 53-54. — AMES.

has been established by the terms of such will, and if so, that a trustee be appointed to carry out such trust.

While this will is very inartistically drawn, I think the clear intention of the testator was to create a trust, by the terms of which the income of his estate was to be divided equally between his widow, brother and sister, and that this trust shall continue as long as his widow lives or remains unmarried, and on the happening of either of such events the trust terminates.

As the testator has made no disposition of the *corpus* of the fund after the expiration of the trust estate, he died intestate as to the residue of his property, and it will go to his next of kin. That the testator named no trustee will not prevent the execution of the trust, for the court will always appoint a trustee wherever necessary to sustain the trust, and a trustee will be appointed. The will contains no power of sale, and therefore the trustee cannot dispose of the land by virtue of any authority contained in the will. It is, in my judgment, however, included in the trust, and subject to that will vest in the heirs-at-law of the testator.

I will advise a decree in accordance with the above.¹

ADAMS v. ADAMS.

SUPREME COURT OF THE UNITED STATES. 1874.

21 Wall. 185.

APPEAL from the Supreme Court of the District of Columbia. The case was thus.

Adams, a government clerk in Washington, owning a house and lot there, on the 13th of August, 1861, executed, with his wife, a deed of the premises to one Appleton, in fee, as trustee for the wife. The deed by appropriate words *in præsentì* conveyed, so far as its terms were concerned, the property for the sole and separate use of the wife for life, with power to lease and to take the rents for her own use, as if she was a feme sole; the trustee having power, on request of the wife, to sell and

¹ See *Dodkin v. Brunt*, L. R. 6 Eq. 580; *Goffe v. Goffe*, 37 R. I. 542; *Ames*, 227n.; *Ann. Cas.* 1916B 246.

Where the testator has named an executor but no trustee, the executor is allowed to act as trustee if such was the expressed or presumed intention of the testator. *Bean v. Comm.*, 186 Mass. 348.

convey the premises in fee and pay the proceeds to her or as she might direct; and after her death (no sale having been made), the trust being that the trustee should hold the property for the children of the marriage as tenants in common, and in default of issue living at the death of the wife, then for Adams, the husband, his heirs and assigns.

The deed was signed by the grantors, and the husband acknowledged it before two justices "to be his act and deed." The wife did the same; being separately examined. The instrument purported to be "signed, sealed, and delivered" in the presence of the same justices, and they signed it as attesting witnesses. The husband put it himself on record in the registry of deeds for the county of Washington, D. C., which was the appropriate place of record for it.

Subsequent to this, that is to say in September, 1870, the husband and wife were divorced by judicial decree.

And subsequently to this again, that is to say, in December, 1871, — the husband being in possession of the deed, and denying that any trust was ever created and executed, and Appleton, on the wife's [husband's?] request, declining to assert the trust, or to act as trustee, — Mrs. Adams filed a bill in the court below against them both, to establish the deed as a settlement made upon her by her husband, to compel a delivery of it to her; to remove Appleton, the trustee named in it, and to have some suitable person appointed trustee in his place. . . .

The court below declared the trust valid and effective in equity as between the parties; appointed a new trustee; required the husband to deliver up the deed to the wife or to the new trustee; and to deliver also to him possession of the premises described in the deed of trust, and to account before the master for the rents and profits of it which had accrued since the filing of the bill, receiving credit for any payment made to the complainant in the mean time, and to pay the complainant's costs of the suit.

From a decree accordingly, the husband appealed.

HUNT, J. The first question in this case is whether there was a delivery of the deed of August 13th, 1861. If not a formal ceremonious delivery, was there a transaction which, between such parties and for such purposes as exist in the present case, the law deems to be sufficient to create a title? The bill avers that the deed was delivered by the parties and put on record in the way which it states.

The answer is responsive to the allegations in the plaintiff's bill, that the deed, after being signed, sealed, and delivered, was recorded at the request of the defendant, Adams, and at his expense.

The burden is thus imposed upon the plaintiff of maintaining her allegation by the proof required where a material allegation in the bill is denied by the answer.

It is evident, however, that the apparent issues of fact and seeming contradictions of statement become less marked by looking at what the parties may suppose to constitute a delivery. That the defendant signed and sealed the deed he admits. That with his wife, the present plaintiff, he acknowledged its execution before two justices of the peace, and that the deed thus acknowledged by him not only purported by words *in præsentia* to grant, bargain, and convey the premises mentioned, but declared that the same was signed, sealed, and delivered, and that this deed, with these declarations in it, he himself put upon the record, is not denied. If these facts constitute a delivery under circumstances like the present, then the defendant, when he denies that a delivery was made, denies the law simply.

Mrs. Adams and two other witnesses were examined. None of Mrs. Adams's statements are denied by Mr. Adams. He was as competent to testify as she was. So, although time, place, and circumstances are pointed out in the testimony of one of the other witnesses, the defendant makes no denial of the statement; nor does he deny the statement of the other witness, giving her conversation with him in detail, in which she says that he admitted the trust.

The deed corresponded substantially with the intention which these witnesses state that Adams expressed. Should the property be sold by the order of Mrs. Adams, the money received would be subject to the same trusts as the land, to wit, for the use of Mrs. Adams during her lifetime and her children after her death. It would not by such transmutation become the absolute property of Mrs. Adams.

Upon the evidence before us we have no doubt that the deed was executed, acknowledged, and recorded by the defendant with the intent to make provision for his wife and children; that he took the deed into his own possession with the understanding, and upon the belief on his part, that he had accomplished that purpose by acknowledging and procuring the record of the deed, by showing the same to his wife, informing

her of its contents, and placing the same in the house therein conveyed in a place equally accessible to her and to himself.

The defendant now seeks to repudiate what he then intended, and to overthrow what he then asserted and believed he had then accomplished.

It may be conceded, as a general rule, that delivery is essential, both in law and in equity, to the validity of a gift, whether of real or personal estate. *Antrobus v. Smith*, 12 Vesey, 39 and note. What constitutes a delivery is a subject of great difference of opinion, some holding that a parting with a deed, even for the purpose of recording, is in itself a delivery. *Cloud v. Calhoun*, 10 Rich. Eq. 362.

It may be conceded also to have been held many times that courts of equity will not enforce a merely gratuitous gift or mere moral obligation. *Ib.*

These concessions do not, however, dispose of the present case.

1st. We are of opinion that the refusal of Appleton, in 1870, to accept the deed, or to act as trustee, is not a controlling circumstance.

Although a trustee may never have heard of the deed, the title vests in him, subject to a disclaimer on his part.¹ Such disclaimer will not, however, defeat the conveyance as a transfer of the equitable interest to a third person. *Lewin, Trusts*, 152; *King v. Donnelly*, 5 Paige, 46. A trust cannot fail for want of a trustee, or by the refusal of all the trustees to accept the trust. The court of chancery will appoint new trustees. . . .

We think that the decree of the court below was well made, and that it should be

*Affirmed.*²

¹ See Ames 229n.

² *Mallott v. Wilson*, [1903] 2 Ch. 494; *Smith v. Davis*, 90 Cal. 25; *Wells v. Ins. Co.*, 128 Iowa 649; *Minot v. Tilton*, 64 N. H. 371, 375 (*semble*); *King v. Donnelly*, 5 Paige (N. Y.) 46 (*semble*); *Cloud v. Calhoun*, 10 Rich. Eq. (S. C.) 358, *accord*. See Ames, 230n.; Dec. Dig., Trusts, 38.

In *Mallott v. Wilson*, [1903] 2 Ch. 494, Byrne, J., said (p. 501): "Mr. Preston, in his edition (7th) of Sheppard's Touchstone, says, at p. 285: 'The law presumes that every grant, etc., is for the benefit of the grantee, etc.; and therefore till the contrary is shewn, supposes an agreement to the grant. From the moment there is evidence of disagreement, then in construction of law the grant is void *ab initio*, as if no grant had been made; and in intendment of law the freehold never passed from the grantor.' And there is a passage to somewhat similar effect in Preston's Abstracts, vol. ii, p. 226: 'In the first place if a grant be made by one man to another, the estate will, in intendment of law, vest immediately in the grantee; but by refusal or

MATTER OF KELLOGG.

COURT OF APPEALS, NEW YORK. 1915.

214 N. Y. 460.

MILLER, J. . . . By the will and codicil thereto the testator appointed the respondent Kellogg and his two sons, the appellant and the respondent Junius S. Morgan, as executors and trustees. The two sons renounced as executors, and the respondent Kellogg qualified as sole executor. Thereafter and on the 10th day of September, 1912, the appellant signed and acknowledged a renunciation as trustee and delivered it to the respondent Kellogg. On the hearing before the referee it was introduced in evidence without objection. On the 1st of December, 1913, the appellant executed a retraction of said renunciation as trustee. A copy thereof was delivered to the respondent Kellogg on the 4th day of December, 1913, and it was filed with the surrogate on January 12th, 1914, and prior to the decree on the accounting of the executor. It appears by the affidavit of said Kellogg that prior to the attempted withdrawal of said renunciation, the other trustees had entered upon their duties as trustees, had set apart for the several trusts securities of the estate amounting to one million dollars and had purchased in their joint names as trustees a real estate mortgage amounting to seventy thousand dollars and corporate stock of the city of New York amounting to forty thousand dollars. After the payment of his debts and certain specific legacies, the testator gave \$200,000 to his executors and trustees in trust for the benefit of his wife, and he directed that the residue be divided into three equal parts, which he gave to his executors and

disagreement the grant will be void *ab initio*. This point was fully discussed, and received a determination in the case of *Thompson v. Leach*, 2 Vent 198.' I felt somewhat embarrassed by the use of the expression 'void *ab initio*,' but I am satisfied now that the true meaning is that, not in regard to all persons and for all purposes is the case to be treated as though the legal estate had never passed, but that as regards the trustee and the person to whom the grant was made, he is, in respect of his liabilities, his burdens, and his rights, in exactly the same position as though no conveyance had ever been made to him." See further as to the general effect of a disclaimer, 32 L. Quar. Rev. 83, 392; 33 *ibid.* 132, 254.

The execution and recording of a deed of trust, though *prima facie* evidence of delivery (*Chilvers v. Race*, 196 Ill. 71), is not conclusive evidence; and if there is no sufficient delivery no trust is created. *Loring v. Hildreth*, 170 Mass. 328.

trustees in trust, one of each for the benefit of each of his three children. The decree of the surrogate adjudged that the attempted revocation of the renunciation by the appellant as trustee was without force and effect and that the other trustees having entered upon their duties "they continue as such trustees and execute said trusts in accordance with the provisions of said will."

The appellant insists that the trustees had no duty to perform until the executor accounted and was directed to turn over the estate to the trustees, and that, therefore, the renunciation, which was a mere waiver of a right, was effectually withdrawn. The statute provides for the resignation of a testamentary trustee (see Code of Civil Procedure, section 2814), but not for a renunciation. Section 2639 of the Code of Civil Procedure provides how an executor may renounce, and how such a renunciation may be retracted. The provision for the retraction seems to be but declaratory of the rule at common law. See *Codding v. Newman*, 3 T. & C. 364; *Robertson v. McGeoch*, 11 Paige, 640. A testamentary trustee derives his authority from the will. Of course, he may refuse to accept the trust, but if he does any act indicative of his acceptance, he may not thereafter resign without the consent of the *cestui que trust* or the court. *Shepherd v. M'Evers*, 4 Johns. Ch. 136; *Brennan v. Willson*, 71 N. Y. 502; *Earle v. Earle*, 16 J. & S. 18; 93 N. Y. 104. Where one of two or more trustees refuses to accept and execute the trust the estate vests in the others the same as though the trustee refusing to act were dead or had not been named. *Matter of Stevenson*, 3 Paige, 420; *King v. Donnelly*, 5 Paige, 46; *Matter of Van Schoonhoven*, Id. 559. The appellant seeks to distinguish the cases last cited on the ground that they involved devises of real estate to trustees. The estate in this case consisted entirely of personalty, and it may be that until the remaining trustees had done some act indicating their acceptance of the trust, and possibly until they had actually received, as trustees, some part of the trust estate, the appellant could have retracted his renunciation or refusal to accept the trust. It is not the law, however, that trustees may not receive any part of the trust estate, consisting of personalty, until the executor has accounted and been directed to pay it over. Whilst in case the same person is both executor and trustee, a decree of the court is the most satisfactory evidence of a separation of his duties, it is not indispensable.

Hurlburt v. Durant, 88 N. Y. 121, 127. And even with respect to the residuary estate, the trustee may enter upon his duties as such even before his accounting and discharge as executor. *Olcott v. Baldwin*, 190 N. Y. 99. Cases dealing with the liability of a person as executor, such as *Matter of Hood*, 98 N. Y. 363, are not decisive of the point involved in this case; but in that case it was recognized that there might be a severance of the trust fund by the executor without a judicial decree.

The trustees were not bound to wait until the final accounting of the executor before investing the money belonging to the trust funds in the manner directed by the testator. Certainly the investment of such moneys was an act of the trustees, who thereupon held the securities purchased as joint tenants. It was then too late for the appellant to withdraw his refusal to serve as trustee. If a person named as trustee were permitted to retract his refusal to accept the trust after the others have entered upon their trust duties, complications might arise which cannot now be foreseen. The only safe rule is to hold a person to his refusal or renunciation unless, at least, it is withdrawn before the others have acted. An executor cannot retract after letters have been issued except by reason of revocation of letters or death there is no other acting executor or administrator. Code of Civil Procedure, section 2639.¹ . . .

In *WETHERELL v. LANGSTON*, 1 Exch. 634, it was held that if a covenant is executed to two obligees upon trust, and one of

¹ A trustee may disclaim either by deed — *Doe v. Harris*, 16 M. & W. 517; *Peppercorn v. Wayman*, 5 DeG. & Sm. 230 — or by parol. *Townson v. Tickell*, 3 B. & Al. 31; *Stacey v. Elph*, 1 M. & K. 195; *Foster v. Dawber*, 1 Dr. & Sm. 172; *Birchall v. Birchall*, 40 Ch. Div. 436; *Adams v. Adams*, 64 N. H. 224; *Barritt v. Silliman*, 13 N. Y. 93; *Beekman v. Bonsor*, 23 N. Y. 298, 305; *Re Robinson*, 37 N. Y. 261; *Green v. Green*, 4 Redf. 357; *Read v. Robinson*, 6 W. & S. 329.

Disclaimer comes too late after conduct indicating acceptance. *Conyngnam v. Conyngnam*, 1 Ves. 522; *Bence v. Gilpin*, L. R. 3 Ex. 76; *Kennedy v. Winn*, 80 Ala. 165. In *Crewe v. Dicken*, 4 Ves. 97, Lord Loughborough held that a release by a trustee to a co-trustee by way of disclaimer was ineffectual, because the release implied an acceptance of the trust. But Lord Eldon, in *Nicloson v. Wordsworth*, 2 Sw. 365, declined to follow this doctrine. See, in confirmation of Lord Eldon, *Hussey v. Markham*, Finch 258. — AMES.

On the question whether an heir can disclaim when his ancestor was named as trustee and neither accepted nor disclaimed, see *Goodson v. Ellison*, 3 Russ. 583; *Wise v. Wise*, 2 Jo. & Lat. 403, 412; *King v. Phillips*, 16 Jur. 1080. Certainly such heir cannot be compelled to administer the trust.

them disclaims, the other cannot enforce the covenant in an action at law. The court said (p. 646):

"There were also some authorities cited in the argument on the part of the plaintiff, which, it was contended, shewed that by the disclaimer of Lord Glenelg the plaintiff became solely entitled to the right of action, which, but for that disclaimer would have belonged to him jointly with Lord Glenelg. They were cases in which a devise or conveyance to two persons jointly, one of whom disclaimed, has been held to vest the whole estate in the other.¹ But the analogy of those cases is inapplicable, because the subject dealt with was not a mere personal contract, but an interest in land. Now, joint obligees or covenantees in personal contracts differ materially from joint-tenants of estates in land, in respect of their power of dealing with their rights. An interest in land, whether joint or several, may be transferred by the act of the party; and the conveyance by a joint-tenant, by release or otherwise, operates on his moiety only; he may convey it to his co-tenant, or to a stranger; whereas a right to sue on a contract cannot be conveyed, though it may be extinguished, and a release by one of the joint parties extinguishes the right of both. It was upon a similar reason, that, in real actions, a nonsuit of one demandant or plaintiff was not the nonsuit of both, but he that made default should be summoned and severed; but in personal actions the nonsuit of one is generally the nonsuit of both: Co. Lit. 139a. To allow a joint devisee or grantee &c. of land to vest the whole interest in his co-devisee or grantee, &c. by refusing to accept the estate, is allowing him to do no more than he could have done by a release immediately after acceptance; but if a joint covenantor could, by refusal, enable his co-covenantor to sue alone, he would do that before acceptance, which he could by no means do after acceptance.

"Since, then, the defendant has not incurred any liability to be sued on a separate contract, and since the plaintiff has not acquired the right to enforce in a separate action any liability

¹ See Shep. Touch. 82; *Humphrey v. Tayleur*, 1 Amb. 136; *Adams v. Taunton*, 5 Madd. 435; *Kingdon v. Castleman*, 46 L. J. Ch. 448; *Matter of Stevenson*, 3 Paige (N. Y.) 420. The result is the same where one of the grantees is dead or otherwise incapable of taking. *McCord v. Bright*, 44 Ind. App. 275; *Ball v. Deas*, 2 Strob. Eq. (S. C.) 24.

If the conveyance is upon trust, and some of the grantees disclaim, the others may execute the trust. *Ames*, 230n.

to which the defendant might be subject in a joint action, it follows, that whether the defendant's original liability be or be not put an end to, this declaration is bad, and the judgment for the plaintiff ought to be reversed." ¹

GREEN v. BLACKWELL.

CHANCERY, NEW JERSEY. 1879.

31 N. J. Eq. 37.

THE CHANCELLOR [RUNYON]. The complainant is one of the two trustees under the marriage settlement of Mrs. Blackwell. He applies, by his bill, to be discharged from that trust on his accounting (due allowance to be made to him for his disbursements and commissions) and paying and delivering over the money and securities of the trust estate which shall be found to be in his hands. The *corpus* of the trust estate under the marriage settlement (which was made in 1863) was \$20,000. That estate the complainant took into his hands and has managed up to this time. By the will of the settlor, Henry W. Green, who died in 1876, a very large addition was made to the trust estate. The complainant, under the circumstances and in view of that addition, declines to act further as trustee thereof. He has not assumed, but has renounced, the trusts under the will. The defendants oppose his discharge, insisting that he shows no sufficient reason therefor. But he is undoubtedly at liberty to apply to this court for his release on the sole ground of unwillingness to act further in the trust. Perry on Trusts §274; Lewin on Trusts 582; Matter of Jones, 4 Sandf. Ch. 614. And the greatly increased amount of the estate devolved upon the trustee by the will, and which it will be incumbent on him to manage if he continues in the office, is a sufficient ground for relieving him if he desires it. Greenwood v. Wakeford, 1 Beav. 576; Coventry v. Coventry, 1 Keen 758. He undertook, by the marriage settlement, to manage an estate of \$20,000. It is not unreasonable in him to decline to continue the management of it, in view of the addition under the will, which was not contemplated in the settlement, by which it is to become ten times greater. Besides, the trust is not in the hands of the complainant alone. His co-trustee remains.

¹ But if some or all of the obligees upon trust disclaim, equity will give relief. Fletcher v. Fletcher, 4 Hare 67, *ante*, p. 184.

The marriage settlement, indeed, provides that in case of the death of one of the trustees thereunder, before the trust shall be fully executed or otherwise determined, the surviving trustee shall nominate, and, with the consent and approbation of the other parties to the settlement or the survivors or survivor of them, appoint a new trustee in the stead of the one dying, and it is urged that this provision for the exercise of personal judgment and discretion in the successor in the trust, should induce this court to refuse to relieve the complainant. But no difficulty will be experienced on that score, for this court will supply the place of the complainant. *Hill on Trustees* 190. The complainant will be permitted to account, and, in the account, will be allowed all proper disbursements made by him for the estate, and also proper commissions; and he will be required to pay or deliver over the trust estate which will, on the accounting, be found remaining in his hands, and thereupon he will be discharged. Under the circumstances, he will be entitled to costs. *Greenwood v. Wakeford*, *Coventry v. Coventry*, *ubi supra*; *Perry on Trusts* §901.¹

Ex parte CONYBEARE'S SETTLEMENT.

CHANCERY. 1853.

1 W. R. 458.

CONYBEARE moved for the appointment as trustee of one of the *cestui que trusts* of an estate in the place of a trustee incapacitated from acting, in consequence of insanity. All parties were desirous that the appointment of the gentleman proposed should be made, and there were special circumstances in the case not necessary to be referred to for the purposes of the report. The Master of the Rolls had declined to make the order asked, on the ground that the Court ought not to appoint a *cestui que trust* as the trustee, even though there was not any other objection to his appointment.

¹ See *Forshaw v. Higginson*, 20 Beav. 485.

If by the trust instrument the trustee is allowed to select a new trustee and resign his office, he may of course do so. And he may resign if all the *cestuis que trust* are *sui juris* and consent. But except with the consent of the *cestuis que trust* or in accordance with the provisions of the trust instrument, a trustee cannot resign without the approval of the court. *Wilkinson v. Parry*, 4 Russ. 272; *Spengler v. Kuhn*, 212 Ill. 186; *Cruger v. Halliday*, 11 Paige (N. Y.) 314.

TURNER, L. J. Under ordinary circumstances, no doubt, the Court will not appoint a trustee who is also one of the *cestui que trusts*; but the rule is not imperative, and when there are special circumstances, the Court will exercise its discretion in judging whether the case is one in which the rule may be departed from. Here I think, under the special circumstances, we may make the appointment asked.

KNIGHT BRUCE, L. J., concurred.¹

TRUSTEE ACT, 1893.

56 & 57 Vict. c. 53.

SEC. 25. The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. . . .

SEC. 26. In any of the following cases, namely:—

(i) Where the High Court appoints or has appointed a new trustee; and

¹ The court may select any fit person to act as trustee. In making the selection regard will usually be paid to (1) the wishes of the settlor; (2) the various interests of the *cestuis que trust*; and (3) the promotion of the due execution of the trust. *Re Tempest*, L. R. 1 Ch. 485.

Except in unusual cases therefore the court will not appoint one of the beneficiaries, or a relative of one of the beneficiaries, or even a relative of a sole beneficiary.

If a person suggested is under a disability which would be ground for removal, *a fortiori* the court will not appoint him.

Where a testator appoints a sole trustee, the court will not usually add a new trustee. *Re Badger*, 84 L. J. Ch. 567.

The Public Trustee Act, 1906 (6 Edw. VII. c. 55) provides for a Public Trustee who may be appointed to act alone or with other trustees. *Cf.* 2 Mills Ann. Stat. Colo., secs. 7577 *et seq.* See also Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35) providing for the appointment of an official of the court to act as trustee.

In England by the Trustee Act, 1893 (56 & 57 Vict. c. 53) sec. 10, it is provided that where a trustee is dead or remains out of the realm for more than 12 months or desires to resign or is unfit or incapable, the surviving or continuing trustees or the personal representatives of the last surviving or continuing trustee may by writing appoint new trustees, unless the trust instrument provides otherwise.

(ii) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person, —

(a) is an infant, or

(b) is out of the jurisdiction of the High Court, or

(c) cannot be found; and

(iii) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land; and

(iv) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead; and

(v) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead; and

(vi) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement; the High Court may make an order (in this Act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the Court may direct, or releasing or disposing of the contingent right to such person as the Court may direct.

MASSACHUSETTS, REVISED LAWS, 1902, c. 147.

SECTION 17. If a person who is seised or possessed of real or personal property or of an interest therein upon a trust, express or implied, is under the age of twenty-one years, insane, out of the commonwealth, or not amenable to the process of any court therein which has equity powers, and in the opinion of the supreme judicial court, the superior court or the probate court it is fit that a sale should be made of such property or of an interest therein, or that a conveyance or transfer should be

made thereof in order to carry into effect the objects of the trust, the court may order such sale, conveyance or transfer to be made and may appoint a suitable person in the place of such trustee to sell, convey or transfer the same in such manner as it may require. If a person so seised or possessed of an estate or entitled thereto upon a trust is within the jurisdiction of the court, he or his guardian may be ordered to make such conveyances as the court orders.¹

REICHERT *v.* THE MISSOURI AND ILLINOIS
COAL COMPANY.

SUPREME COURT, ILLINOIS. 1907.

231 Ill. 238.

CARTWRIGHT, J. The Appellate Court for the Fourth District affirmed the judgment for \$1500 and costs recovered by appellees, against appellant, in the circuit court of St. Clair county, in a suit brought under a mining lease or contract. From the judgment of the Appellate Court the case is brought to this court by appeal.

It is first contended on behalf of appellant that the suit was not brought in the names of the parties in whom the legal interest in the contract was vested. The facts, so far as they relate to that question, are as follows: On May 7, 1891, Joseph Reichert and Maria Reichert, his wife, executed a lease of certain lands in St. Clair county to Crittenden McKinley and William S. Scott, giving to them the right to take coal from under said lands. The lease was for a term of fifty years from its date, unless the coal should be sooner exhausted, and the lessees agreed to pay one-eighth of one cent for every bushel of coal mined and taken out which would pass over a screen with spaces measuring one and one-half inches between the bars, the amount to be determined by the railroad freight bills or weighmaster's certificates or tickets, or upon any other good and sufficient evidence that would satisfy the lessors. The lessees also agreed to mine the coal and do the work in a proper, workmanlike and skillful

¹ For a history and summary of statutes allowing the equity courts either directly by decree or by a conveyance by a master or other officer of the court, to vest title in the *cestui que trust* or in a new trustee, without a conveyance by the old trustee, see Huston, Decrees in Equity, chap. II and Appendix.

manner, regularly, properly and effectually, without waste or destruction to the coal. The lease was assigned by the lessees to the appellant, a corporation of the State of Missouri, and it entered into possession under the lease and began mining the coal. On August 22, 1893, Joseph Reichert died, leaving said Maria Reichert, his widow, and eight children, his only heirs-at-law. On September 25, 1893, the widow and heirs, together with the wives and husbands of the said heirs, respectively, executed a trust deed to said Maria Reichert and August Barthel, conveying said lands, subject to the lease, to said trustees, "their successors and assigns." The trust deed provided that the trustees and their successors in trust should have a right to enter into and upon the premises and receive all rents and royalties, issues and profits thereof. The trust deed further provided that if the trustees, or either of them, should die or go abroad to reside, desire to be discharged from, renounce, decline or become incapable or unfit to act in the trusts, then, in every and any such case, it should be lawful for a majority of the heirs mentioned in the trust deed, or a majority of the survivors thereof, by any writing or writings under their hands, attested by two or more witnesses, to nominate and substitute any person or persons to be trustee or trustees in place of the trustee or trustees so dying, going to reside abroad, desiring to be discharged, renouncing, declining or becoming incapable or unfit to act as trustee. The next provision was, that so often as any new trustee or trustees should be appointed, all the real estate which should then be holden upon the trusts should thereupon be conveyed, assigned and transferred, respectively, in such manner that the same might become legally and effectually vested in the acting trustees for the time being, to and for the same uses and upon the same trusts and with and subject to the same powers and provisions as were therein declared and contained of and concerning the real estate. It also provided that every new trustee so appointed should, from the time of filing his bond, be competent, in all things, to act in the execution of the trusts as fully and effectually and with all the same powers and authorities, to all purposes whatsoever, as if he had been thereby originally appointed the trustee in the place of the trustee whom he should, whether immediately or otherwise, succeed. Maria Reichert died, and on May 18, 1896, August Barthel resigned as trustee. The remaining heirs appointed William J. Reichert and Charles Becker, the appellees, successors

in trust to Maria Reichert and August Barthel, in the manner specified in the trust deed, and the trustees so appointed accepted the trust and proceeded to act. The appellant rendered accounts and statements to William J. Reichert and sent checks to him at different times. This suit was brought to the September term, 1903, of the court by the appellees, the new trustees, and the original declaration declared for the rent stipulated in the lease. An additional count charged the appellant with failing to properly work and mine the coal in accordance with its agreement and with wasting and destroying coal, whereby appellees were deprived of a large amount of rents which they otherwise would and ought to have received.

The argument that appellees could not maintain the suit is based on the proposition that they did not have the legal title to the reversion, and in support of that claim counsel present two propositions: First, that upon the death of Maria Reichert the legal title which she held descended to her heirs-at-law; and second, that upon the resignation of August Barthel the legal title conveyed to him remained in him, and it would be necessary for him to execute a deed and convey whatever title was vested in him to the newly appointed trustees before they would be authorized to execute the trust.

The grantee of a reversion may or may not be entitled to the rent reserved in a lease. In this case the conveyance is subject to the lease and there is no reservation of rent, but the trust deed expressly provides that the trustees shall collect the rent and apply it to the trusts therein declared. If the appellees were lawfully appointed trustees and vested with the care, control and management of the trust estate they were entitled to maintain the suit. The first proposition above stated is not the law. Trustees are excepted from the provision of the statute requiring a declaration in a conveyance that the estate is in joint tenancy, and unless there is a provision to the contrary they hold as joint tenants. Upon the death of one the administration of the trust devolves upon the survivor and nothing passes to the heir or personal representative of the deceased trustee. *Golder v. Bressler*, 105 Ill. 419.

Whether the second proposition is correct depends upon a consideration of the law and the provisions of the trust deed. A trustee takes precisely that quantum of legal estate which is necessary to the discharge of the declared powers and duties of such trustee, regardless of technical terms ordinarily required

for a conveyance. *Walton v. Follansbee*, 131 Ill. 147; *Lawrence v. Lawrence*, 181 id. 248. The estate will inure to the trustee until the active trusts are accomplished, when the Statute of Uses will execute the use, and the entire title, both legal and equitable, will be in the one beneficially interested. The decision in *Glover v. Condell*, 163 Ill. 566, relied upon by counsel for appellant, clearly recognized that doctrine, but held that a conveyance or transfer of personal property was necessary because personal property is not within the Statute of Uses. Barthel had such an estate as would continue until the active trusts were executed and he resigned before that time was reached, when successors in trust to him and Maria Reichert were appointed, as the trust deed provided. One who creates a trust has a right to provide a method for filling vacancies and for the appointment of successors in trust. The trust deed in this case conveyed the estate to the trustees therein named, "their successors and assigns," and it provided for the appointment of successors in trust to whom the estate should go.

Much stress is laid in argument upon the provision of the trust deed that upon the appointment of a new trustee the real estate should thereupon be conveyed, assigned and transferred in such manner as to legally and effectually vest the same in the acting trustee, but we do not interpret that provision as meaning that a conveyance shall be executed by any one. The heirs-at-law of the deceased trustee might be incapable of making a deed, or the beneficiary would have no method of compelling a conveyance except at the end of legal proceedings. The trust deed provides that the trustees and their successors in trust shall have a right to enter upon the premises and collect the rents and royalties, and that every new trustee, from the time of filing his bond, shall be competent, in all things, to act in the execution of the trusts, and we regard the provision in question as meaning that upon the appointment of a new trustee the estate shall thereupon be deemed to be conveyed and transferred to him. That is the only interpretation which is consistent with the conveyance to the trustees and their successors and with the other provisions of the trust deed. The appellees were the proper parties to maintain the suit. . . .

*Judgment affirmed.*¹

¹ The donee of a power to appoint new trustees has wide discretion in selecting a trustee. *Forster v. Abraham*, L. R. 17 Eq. 351 (life beneficiary appointed one of several trustees); *Re Coode*, 108 L. T. n. s. 94 (husband of

PRICE'S ESTATE.

SUPREME COURT, PENNSYLVANIA. 1904.

209 Pa. 210.

PETITION for removal of trustee.

From the record it appeared that the petition was filed by Mary Kemper, a daughter of testator, and by Austin W. Bennett, guardian of Jesse C. Clagett, a grandson of testator, and a son of Mary Kemper. The petition set forth various proceedings in the orphans' court wherein the petitioners sought to surcharge the trustees in their third and fourth accounts, and to open the first and second accounts by bills of review. It was averred that in the answers to the bills of review, the trustees charged that Jesse C. Clagett was an illegitimate son of Mary Kemper. The petitioners averred that such charge was scandalous and groundless, and that in proceedings before an examiner the trustees were compelled to abandon the charge. The petition further averred that Mary Kemper, and Jesse C. Clagett, through his guardian, had instituted against Thomas R. Fort, Jr., civil suits for damages for libel, and that these suits were still pending. The trustees filed an answer responsive to the petition, and the case was heard on bill and answer.

The court in an opinion by PENROSE, J., dismissed the petition.

PER CURIAM. Mere differences of opinion or judgment between trustee and cestui que trust are not enough to justify the removal of the former. To deprive the beneficiary of unrestrained control over his estate was the very object of the creation of the trust. The fundamental purpose of the creator of the trust was to protect his beneficiary from some anticipated danger, from creditors, from risks of business, from his or her own improvidence or other like cause, or to protect ultimate life beneficiary); *Stearns v. Fraleigh*, 39 Fla. 603 (husband of *cestui que trust* appointed by her); *Tweedy v. Urquhart*, 30 Ga. 446 (like preceding case); *Montefiore v. Guedalla*, [1903] 2 Ch. 723 (donee appointed himself one of several trustees).

But there are limits to the power of the donee. In *Bowditch v. Banuelos*, 1 Gray (Mass.) 220, the court said (p. 231): "But when we say, that she had a power at her pleasure to appoint, we do not mean to say that this was an arbitrary power, to appoint a person unfit or unsuitable to execute such a trust; as a minor, an idiot, a pauper, or person incapable of performing the duties. It must be a person of full age, sufficient mental and legal capacity, and in all respects capable of performing the required duties."

beneficiaries from waste or spoliation of the estate by the immediate one. For this reason he substituted the judgment and control of the trustee for that of the cestui que trust, or of the courts.

The act of 1868 was intended to facilitate the exercise of the powers of the court over the removal of trustees, and to enlarge the influence and authority in that respect of the cestui que trust. But it was not intended to subject the office of trustee and the discretion of the court to a mandatory whim of the cestui que trust. The court still retains the authority to require that a valid and sufficient cause shall be shown for the removal. This was the construction of the act adopted in *Stevenson's Appeal*, 68 Pa. 101, and after some departures, more apparent than real, as said by our Brother MESTREZAT in *Neafie's Estate*, 199 Pa. 307, finally settled in the case last named.

The petition for removal in the present case is founded on averments of inharmonious relations amounting to hostile litigation, overcharges and bad management on the part of the trustees, and insecurity of the trust funds. The case was argued on petition and answer. The answer being full and responsive, except in one particular that will be noticed, the court would have been warranted in dismissing the petition without more.

One matter only appears to require special notice. While inharmonious relations between trustee and cestui que trust not altogether the fault of the former, will not generally be considered a sufficient cause for removal, yet where they have reached so acrimonious a condition as to make any personal intercourse impossible and to hinder the proper transaction of business between the parties, a due regard for the interests of the estate and the rights of the cestui que trust may require a change of trustee. "If his management of the trust justly subjects him to criticism and to a lack of confidence by the cestui que trust, he should not be continued in control of the estate:" *Neafie's Est.*, supra. In the present case when the trustees were cited to file an account they set up in answer that Jesse C. Clagett one of the petitioners (by his guardian) and son of the other petitioner, was not legitimate, and therefore had no interest that entitled him to an account. No attempt was made to sustain this averment, except the statement that it was made upon information and belief and as it was admitted that the son was born in wedlock and bore the name of his mother's husband and his legitimacy therefore not legally open

to question, it is not easy to perceive the relevancy of the averment, or why it should have been made. As this matter is the subject of litigation still pending, we refrain from further comment, but should the litigation show no sufficient justification for the averment of illegitimacy the court below would be well warranted in entertaining a new petition for removal based on the conclusion that the answer was a gratuitous insult warranting an inference that the conduct and management of the estate by the trustees were governed by other motives than a *bona fide* desire for the best interests of the petitioners.

*Decree affirmed.*¹

MATTER OF TOWNSEND.

SURROGATE'S COURT, NEW YORK. 1911.

73 Misc. Rep. 481.

DAVIE, S. William A. Townsend, a resident of the town of Olean, died May 22, 1911, leaving him surviving no widow or descendants. His heirs at law and next of kin are two brothers, Zachariah and Stanley, and one nephew, Henry, the son of a deceased brother. He died possessed of real estate of the value of \$11,000 and personal property, \$13,000. He left a will bearing date July 6, 1906, and a codicil thereto dated May 16, 1911. . . .

The second paragraph of the codicil is as follows: "I desire to, and do hereby change the fourth paragraph of my said will so that it shall read as follows: All the rest, residue and remainder of my estate, both real and personal, of every kind nature and description I give, devise and bequeath equally, one-third to

¹ See *Wylie v. Bushnell*, 277 Ill. 484. But *cf. Maydwell v. Maydwell*, 135 Tenn. 1, Ann. Cas. 1918B 1043.

A court may in its discretion remove a trustee for any cause which renders him an unfit person to administer the trust. Among the numerous grounds for removal may be mentioned embezzlement of the trust property, or other serious breach of trust; commission of felony; incompetency due to old age, habitual drunkenness, lunacy, infancy, etc.; holding views at variance with the object of the trust, in the case of a religious trust; adverse interest; permanent residence abroad; the showing of favoritism to one or more of the *cestuis que trust*; unreasonable or corrupt failure to co-operate with co-trustees. See *Ames*, 223n., 249n.; *Lewin, Trusts*, 1087 *et seq.*; *Loring, Trustees' Handbook*, 22-24; *Perry, Trusts*, secs. 275 *et seq.*

The insolvency or bankruptcy of the trustee may be but is not necessarily a ground for removal.

my brother Stanley C. Townsend of Lancaster, Ohio; one-third to Mrs. Mittie Townsend, widow of my deceased brother, J. E. Townsend of Bridgton, New Jersey; and one-third to my nephew Henry Townsend of Bridgton, New Jersey; the share and third hereby devised and bequeathed to my said nephew Henry Townsend is in trust however for the following uses and purposes: to keep the same invested and to pay over the income therefrom at least annually to my brother Z. A. Townsend of Tuckahoe, New Jersey, during the term of his natural life and if, in the judgment of my said nephew my said brother shall require any part of said principal sum so devised and bequeathed in trust for his comfort and support during his life time, I direct my said trustee to pay the same over to him at such time and in such amounts as in his judgment is proper."

The third item of the codicil provides that "Upon the death of my said brother, Z. A. Townsend, I give and devise and bequeath the remainder of the sum herein devised and bequeathed to my said nephew Henry Townsend in trust, to my said nephew Henry Townsend absolutely."

The nephew, Henry, is named as executor. . . .

The trust created by the codicil for the support and maintenance of the brother of decedent during his lifetime is a legal and commendable one, but his selection of trustee is unfortunate. In *Rathbone v. Hooney*, 58 N. Y. 463, S. died seized of certain real estate, leaving a will by which she devised the same to P. in trust to receive the rents and profits and apply the same to the benefit of R. during her lifetime, with the remainder to P. in fee. The court sustained this trust and the designation of the trustee. That case, however, differs very materially in principle from the one now under consideration. There the trustee was clothed with no discretion; the line of demarcation between the interests of the *cestui que trust* and the remainderman was clearly defined by the instrument creating the trust. Here it is entirely apparent that the income derived from the one-third of the residue may not be sufficient to comfortably support and maintain the beneficiary during his lifetime and, in consequence, resort to the principal may become necessary. The more of the principal which may in this manner be exhausted, the smaller the interest passing to the remainderman. He is given, by the terms of the codicil, a discretion as to how much of the principal shall be used for that purpose. In that particular his interests and those of the *cestui que trust* are

absolutely antagonistic. The trustee not only occupies a dual capacity but, in the performance of the duties of his trust, his personal interests conflict directly with the rights and interests of the beneficiary.

Chaplin on Express Trusts and Powers, section 142, says: "The creator of a trust may also grant or devise a remainder to a trustee, limited on the trust;" but the only authority cited in support of that proposition is the case of *Rathbone v. Hooney*, *supra*, which as already indicated is clearly distinguishable from the trust created by the codicil in this case. The courts have also recognized the legality of certain trusts where the trustee occupied a dual capacity. *Martin v. Pine*, 79 Hun, 426; *Howland v. Clendenin*, 134 N. Y. 305, 310; *Raymond v. Rochester Trust Co.*, 75 Hun, 239; *Asche v. Asche*, 113 N. Y. 232; *Warner v. Durant*, 76 id. 133; *Mott v. Ackerman*, 92 id. 539.

But an examination of these authorities will fail to show any such situation of absolute antagonism between the interests of the trustee and the *cestui que trust* as exists in this case. Perry on Trusts, section 39, cites approvingly the rule laid down by Sir George J. Turner, L. J., as follows: "A third rule which may be safely laid down is that the court, in appointing a trustee, will have regard to the question whether his appointment will promote or impede the execution of the trust; for the very purpose of the appointment is that the trust may be better carried into execution."

In view of the complications which are very likely to arise in case the trustee designated by the terms of the codicil enters upon the discharge of his duties as such trustee, I am of the opinion that the ordinary letters testamentary should issue to him as executor and, after the amount of the trust estate is established by his judicial settlement as executor, another trustee should be appointed for the purpose of managing and controlling the trust estate during the life of the beneficiary.

*Decreed accordingly.*¹

¹ The settlor has wide scope in the selection of trustees. The mere fact that the person selected is one of the beneficiaries or is related to one or more of the beneficiaries or is a person who for any reason would not be appointed by the court, will not disqualify him. *Story v. Palmer*, 46 N. J. Eq. 1; *Curran v. Green*, 18 R. I. 329.

A statute providing that only residents may act as trustees violates the provisions of the Federal Constitution (Art. 4, sec. 2, and the 14th Amendment) in regard to the privileges and immunities of citizens. *Shirk v. LaFayette*, 52 Fed. 857; *Roby v. Smith*, 131 Ind. 342.

SECTION III.

*The Cestui Que Trust.
Herein of Charitable Trusts.*

FOLK v. HUGHES.

SUPREME COURT, SOUTH CAROLINA. 1915.

100 S. C. 220.

THIS is an action to foreclose a mortgage given to C. Ehrhardt & Sons by G. W. Hughes and now owned by plaintiff. The children of the mortgagor claim an interest in the mortgaged property.

On September 22, 1890, J. W. Hughes conveyed the land to his son, G. W. Hughes, "to have and to hold the said described tract of land with all privileges and appurtenances thereof to the said G. W. Hughes for his uses and benefits, and for the maintenance and support of the children of the said G. W. Hughes during the term of his natural life."

On November 10, 1892, G. W. Hughes reconveyed it to his father by warranty deed "to have and to hold the same unto him, the said J. W. Hughes, and assigns forever."

On April 15, 1899, J. W. Hughes conveyed it back to G. W. Hughes, his heirs and assigns, with full covenants of warranty.

On October 22, 1901, G. W. Hughes executed the mortgage herein sought to be foreclosed.

At date of the first deed to him, in 1890, G. W. Hughes was married, but had no child, and was still childless at the date of his reconveyance to his father in 1892. His first wife died March 2, 1894, having borne him one child, the defendant, Robert, the date of whose birth is not stated in the record. The defendants, Ruth and Grace, are his children by his last wife, the defendant, Lottie Hughes. He died some time before the commencement of the action.

The Circuit Court decreed foreclosure of the mortgage. The defendants appeal.¹

HYDRICK, J. . . . The life estate given him [G. W. Hughes] was not absolute, but, by the terms of the deed, it was given to him "for his uses and benefits and *for the maintenance and*

¹ The statement of facts is taken from the opinion. A part of the opinion in which it was held that the children had a contingent remainder is omitted.

support of the children of the said *G. W. Hughes* during the term of his natural life." It was, therefore, partially in trust for the benefit of his after-born children. In *Hunter v. Hunter*, 58 S. C. 382, 36 S. E. 734, a devise to the testator's widow "for and during her lifetime, to support herself and my children and to educate my children," was construed to give the widow a trust estate for life for the benefit of the children, and it was held that the widow had no power to sell even her life estate, no such power having been given her in the will.

It is not necessary to the creation of a trust estate that the *cestui que trust* should be in existence at the time of its creation. 1 *Perry on Trusts*, sec. 66; *Tiffany & Bullard on Trusts* 3; *Carson v. Carson*, 1 *Winston Ch. (N. C.)* 24; *Ashurst v. Given*, 5 *Watts & S. (Pa.)* 329. In the case last cited, a devise to a father in trust for his children at the time of his death was held to be good, although the father had no children at the time of the vesting of the estate in him as trustee.

A trustee will not be allowed by his own act to defeat or destroy his trust, and those who deal with him in respect of the trust estate, with knowledge of the trust, are bound by the terms of the trust, and if they purchase the trust estate they take it encumbered with the trust. . . .

*Judgment reversed.*¹

MORICE v. THE BISHOP OF DURHAM.

CHANCERY. 1805.

10 Ves. 521.

THIS cause came on upon an appeal by the defendant, the Bishop of Durham, from the decree of the Master of the Rolls.

Ann Cracherode, by her will, dated the 16th of April, 1801, and duly executed to pass real estate, after giving several legacies to her next of kin and others, some of which she directed to be paid out of the produce of her real estate, directed to be sold, bequeathed all her personal estate to the Bishop of Durham, his executors, &c., upon trust to pay her debts and legacies, &c.; and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham in his own discre-

¹ A covenant to stand seised to the use of an unborn relative is valid. *Gray, Rule ag. Perp.*, sec. 62. On the question of the validity of a bargain and sale to a person not in esse, see *ibid.*, secs. 61-66.

tion shall most approve of; and she appointed the Bishop her sole executor.

The bill was filed by the next of kin to have the will established except as to the residuary bequest, and that such bequest may be declared void. The Attorney General was made a defendant. The Bishop, by his answer, expressly disclaimed any beneficial interest in himself personally.¹

. THE LORD CHANCELLOR [ELDON]. This, with the single exception of *Brown v. Yeall*, 7 Ves. 50, n., is a new case. The questions are, 1st, Whether a trust was intended to be created at all? 2dly, Whether it was effectually created? 3dly, If ineffectually created, whether the defendant, the Bishop of Durham, can, according to the decisions, and upon the authority of those decisions, take this property for his own use and benefit. As to the last, I understand a doubt has been raised in the discussion of some question bearing analogy to this in another court, — how far it is competent to a testator to give to his friend his personal estate, to apply it to such purposes of bounty not arising to trust as the testator himself would have been likely to apply it to. That question, as far as this court has to do with it, depends altogether upon this: if the testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take himself, it must be upon this ground, according to the authorities, — that the testator did not mean to create a trust, but intended a gift to that person for his own use and benefit; for if he was intended to have it entirely in his own power and discretion whether to make the application or not, it is absolutely given, and it is the effect of his own will and not the obligation imposed by the testament: the one inclining, the other compelling, him to execute the purpose. But if he cannot, or was not intended to, be compelled, the question is not then upon a trust that has failed, or the intent to create a trust; but the will must be read as if no such intention was expressed or to be discovered in it.

Pierson v. Garnett, 2 Bro. C. C. 38, 226, and the other cases of that class, do not bear upon this in any degree; for the question, whether a trust was intended, arose from two or three circumstances, which must all concur where there is no express trust. *Prima facie* an absolute interest was given, and the question was, whether precatory, not mandatory, words imposed

¹ The statement of facts is taken from the report of the case in 9 Ves. 399.

a trust upon that person; and the court has said, before those words of request or accommodation create a trust, it must be shewn that the object and the subject are certain; and it is not immaterial to this case that it must be shewn that the objects are certain. If neither the objects nor the subject are certain, then the recommendation or request does not create a trust; for of necessity the alleged trustee is to execute the trust, and, the property being so uncertain and indefinite, it may be conceived the testator meant to leave it entirely to the will and pleasure of the legatee, whether he would take upon himself that which is technically called a trust. Wherever the subject to be administered as trust property, and the objects for whose benefit it is to be administered are to be found in a will, not expressly creating trust, the indefinite nature and *quantum* of the subject, and the indefinite nature of the objects, are always used by the court as evidence that the mind of the testator was not to create a trust; and the difficulty that would be imposed upon the court to say what should be so applied, or to what objects, has been the foundation of the argument that no trust was intended.

But the principle of those cases has never been held in this court applicable to a case where the testator himself has expressly said he gives his property upon trust. If he gives upon trust, hereafter to be declared, it might perhaps originally have been as well to have held that, if he did not declare any trust, the person to whom the property was given should take it. If he says he gives in trust and stops there, meaning to make a codicil or an addition to his will, or, where he gives upon trusts which fail, or are ineffectually expressed, in all those cases the court has said, if upon the face of the will there is declaration plain that the person to whom the property is given is to take it in trust; and, though the trust is not declared, or is ineffectually declared, or becomes incapable of taking effect, the party taking shall be a trustee; if not for those who were to take by the will, for those who take under the disposition of the law. It is impossible, therefore, to contend that, if this is a trust ineffectually expressed, the Bishop of Durham can hold for his own benefit. I do not advert to what appears upon the record of his intention to the contrary, and his disposition to make the application; for I must look only to the will, without any bias from the nature of the disposition, or the temper and quality of the person who is to execute the trust.

The next consideration is, whether this is a trust effectually declared; and, if not as to the whole, as to part. I put it so; as it is said, if the word "benevolence" means charity, and "liberality" means something different from that idea, which in a court of justice we are obliged to apply to that word "charity" (and, I admit, we are obliged to apply to it many senses not falling within its ordinary signification), there is a ground for an application in this case partially, if it cannot be wholly, to charity. It does not seem to me upon the authorities, particularly the Attorney General *v.* Whorwood, 1 Ves. 534, that the argument for a proportionate division, or a division of some sort, would be displaced. I take the result of that case to be that the substratum of that charity failed, and all those partial dispositions that would have been good charity if not connected with that, failed together with it. It has been decided upon that principle, that, though money may be given to an infirmary or a school, yet, if that bequest is connected with a purpose of building an infirmary or school, and the money is then to be laid out upon it so built, the purpose, which is the foundation, failing, the superstructure must fail with it. The Attorney General *v.* Doyley, 4 Vin. 485, 2 Eq. Ca. Ab. 194, is almost the only case that has been cited for a proportional division. The testator expressly directed the trustees to dispose of his estate to such of his relations, of his mother's side, who were most deserving, and in such manner and proportions as they should think fit, to such charitable use as they should think most proper and convenient; and the court, which has taken strong liberties upon this subject of charity, though the manner and proportion were left to certain individuals, held that equality is equity, and there should be an equal division; but it is expressly declared that those who took were persons who could take under a bequest to charitable uses; and there was no difficulty in that case in saying, those words must be construed according to the habit and allowed authorities of the court.

The only case decided upon any principle that can govern this is *Brown v. Yeall*, which applies strongly. I do not trust myself with the question whether the principle was well applied in that instance, but the decision furnishes a principle which the court must endeavor well to apply in cases that occur. I do not hesitate to say I entertain doubt, not of the principle upon which that case was decided, but whether it was well applied in that instance. Mr. Bradley was a very able lawyer; yet he

mistook his way, as Serjeant Aspinall had not long before. Mr. Bradley gave a great portion of his fortune to accumulate for many years; and, meaning that it should be disposed of to charitable purposes, constituted a fund, expressly stating that his purpose was a charitable purpose, and confirming that by directing that charitable purpose to be carried on, as to the mode of executing it, by that court which, according to the constitution of the country, ordinarily administers property given to charitable uses. In his opinion, therefore, independent of particular authority, there was a principle, suggested by all other cases of trust, that if a trust was declared in such terms that this court could not execute it, that trust was ill-declared, and must fail, for the benefit of the next of kin. The principle upon which that trust was ill-declared is this. As it is a maxim that the execution of a trust shall be under the control of the court, it must be of such a nature that it can be under that control, so that the administration of it can be reviewed by the court; or, if the trustee dies, the court itself can execute the trust; a trust, therefore, which, in the case of mal-administration, could be reformed, and a due administration directed, and then, unless the subject and the objects can be ascertained upon principles familiar in other cases, it must be decided that the court can neither reform mal-administration nor direct a due administration. That is the principle of that case. Upon the question whether that principle was well applied in that instance, different minds will reason differently. I should have been disposed to say that, where such a purpose was expressed, it was not a strained construction to hold that the happiness of mankind intended was that which was to be promoted by the circulation of religious and virtuous learning; and, the testator having stated that to be the charitable purpose, which unquestionably was so, the distribution of books for the promotion of religion, the court might have so understood him; and the testator having not only called it a charitable purpose, but delegated the execution to this court, ought to be taken to have meant that.

Upon these grounds in a subsequent case, *The Attorney General v. Stepney*, 10 Ves. 22, as to the Welch charities, it appeared to me too much, considering the Society in this country for the Propagation of the Gospel, &c., to say a trust for the circulation of bibles, prayer-books, and other religious books was not good. Then, looking back to the history of the law

upon this subject, I say, with the Master of the Rolls, that a case has not been yet decided in which the court has executed a charitable purpose, unless the will contains a description of that which the law acknowledges to be a charitable purpose, or devotes the property to purposes of charity in general. Upon those cases in which the will devotes the property to charitable purposes, described, observation is unnecessary. With reference to those in which the court takes upon itself to say it is a disposition to charity, where in some the mode is left to individuals, in others individuals cannot select either the mode or the objects, but it falls upon the king, as *parens patriæ*, to apply the property, it is enough at this day to say, the court, by long habitual construction of those general words, has fixed the sense; and, where there is a gift to charity in general, whether it is to be executed by individuals selected by the testator himself, or the king, as *parens patriæ*, is to execute it, (and I allude to the case in *Levinz, The Attorney General v. Matthews*, 2 Lev. 167,) it is the duty of such trustees on the one hand, and of the crown upon the other, to apply the money to charity in the sense which the determinations have affixed to that word in this court; viz. either such charitable purposes as are expressed in the statute (43 Eliz. c. 4), or to purposes having analogy to those. I believe the expression "charitable purposes," as used in this court, has been applied to many acts described in that statute, and analogous to those, not because they can with propriety be called charitable, but as that denomination is by the statute given to all the purposes described.

The question, then, is entirely whether this is according to the intention a gift to purposes of charity in general as understood in this court; such that this court would have held the Bishop bound, and would have compelled him to apply the surplus to such charitable purposes as can be answered only in obedience to decrees where the gift is to charity in general; or is it, or may it be according to the intention, to such purposes, going beyond those partially or altogether which the court understands by "charitable purposes"; and, if that is the intention, is the gift too indefinite to create an effectual trust to be here executed? The argument has not denied, nor is it necessary, in order to support this decree, that the person created the trustee might give the property to such charitable uses as this court holds charitable uses within the ordinary meaning. It is not contended, and it is not necessary, to support this

decree, to contend, that the trustee might not consistently with the intention have devoted every shilling to uses in that sense charitable, and of course a part of the property. But the true question is, whether, if upon the one hand he might have devoted the whole to purposes in this sense charitable, he might not equally according to the intention have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes as this court construes those words; and, if according to the intention it was competent to him to do so, I do not apprehend that under any authority upon such words the court could have charged him with mal-administration, if he had applied the whole to purposes, which, according to the meaning of the testator, are benevolent and liberal, though not acts of that species of benevolence and liberality which this court in the construction of a will calls charitable acts.

The question, therefore, resolves itself entirely into that; for I agree there is no magic in words, and if the real meaning of these words is charity or charitable purposes, according to the technical sense in which those words are used in this court, all the consequences follow; if, on the other hand, the intention was to describe anything beyond that, then the testator meant to repose in the Bishop a discretion, not to apply the property for his own benefit, but that would enable him to apply it to purposes more indefinite than those to which we must look, considering them purposes creating a trust; for, if there is as much of indefinite nature in the purposes intended to be expressed, as in the cases to which I first alluded, where the objects are too uncertain to make recommendation amount to trust by analogy, the trust is as ineffectual, — the only difference being, that in the one case no trust is declared, and the recommendation fails, the objects being too indefinite; in the other the testator has expressly said it is a trust, and the trustee consequently takes, not for his own benefit, but for purposes not sufficiently defined to be controlled and managed by this court. Upon these words much criticism may be used. But the question is, whether, according to the ordinary sense, not the sense of the passages and authors alluded to, treating upon the great and extensive sense of the word "charity," in the Christian religion, this testatrix meant by these words to confine the defendant to such acts of charity or charitable purposes as this court would have enforced by decree, and reference to a master. I do not think that was the intention; and, if not, the intention is too

indefinite to create a trust. But it was the intention to create a trust, and the object being too indefinite has failed. The consequence of law is, that the Bishop takes the property upon trust to dispose of it as the law will dispose of it, not for his own benefit or any purpose this court can effectuate. I think, therefore, this decree is right.

*The decree was affirmed.*¹

¹ In the following cases it was held that the purpose of the testator was not confined to charities and the intended trust failed: *James v. Allen*, 3 Mer. 17 (for such benevolent purposes as the trustees may unanimously agree upon); *Vezey v. Jamson*, 1 Sim. & Stu. 69 (to executors to apply to any charitable or public purposes or to any person or persons as they should think fit or as they should think would have been agreeable to the testator); *Omanney v. Butcher*, T. & R. 260 (to be given in private charity); *Williams v. Kershaw*, 5 Cl. & F. 111 (benevolent, charitable and religious purposes); *Kendall v. Granger*, 5 Beav. 300 (encouraging undertakings of general utility); *Re Macduff*, [1896] 2 Ch. 451 (charitable or philanthropic purposes); *Re Sidney*, [1908] 1 Ch. 126 (emigration uses); *Re Davidson*, [1909] 1 Ch. 567 (to the Roman Catholic Archbishop of W. for the time being to be distributed between such charitable, religious or other societies, institutions, persons or objects in connection with the Roman Catholic faith in England as he shall think fit); *Re Freeman*, [1908] 1 Ch. 720 (to the Charitable Organization Society to pay the income to such societies as are most in need of help); *Re Da Costa*, [1912] 1 Ch. 337 (for the sole benefit of such person or persons and for such public purposes as the Governor-in-Chief for the time being of South Australia shall in writing direct); *Dunne v. Byrne*, [1912] A. C. 407 (to the Roman Catholic Archbishop of B. and his successors to be expended as they may judge most conducive to the good of religion in this diocese); *Re Rowe*, 30 T. L. R. 528 (to a city company to be employed and bestowed according to their discretion); *A. G. v. Brown*, 33 T. L. R. 294 (such charitable, benevolent, religious and educational institutions, societies, associations and objects as T. should select); *Houston v. Burns*, 34 T. L. R. 219 (such public, benevolent or charitable purposes in connection with the parish of X as T shall think proper); *Blair v. Duncan*, [1902] A. C. 37 (charitable or public purposes; Scotch law); *Grimond v. Grimond*, [1905] A. C. 124 (such charitable or religious institutions and societies as T may select; Scotch law); *Baird's Trustees v. Lord Advocate*, 15 Sess. Cas. (4th series) 682 (holding that in Scotland religious purposes are not charitable); *Turnbull's Trustees v. Lord Advocate*, [1917] S. C. 591 (public, benevolent or charitable purposes in connection with the parish of L.); *Adye v. Smith*, 44 Conn. 60 (benevolent purposes); *Chamberlain v. Stearns*, 111 Mass. 267 (solely for benevolent purposes); *Nichols v. Allen*, 130 Mass. 211 (to be distributed to such persons, societies or institutions as T may consider most deserving); *Minot v. A. G.*, 189 Mass. 176 (charitable or worthy objects); *Norris v. Thomson*, 19 N. J. Eq. 307, 20 N. J. Eq. 489 (to benevolent, religious or charitable institutions); *Livesey v. Jones*, 55 N. J. Eq. 204, 56 N. J. Eq. 453 (for the promotion of the religious, moral and social welfare of the people); *Hyde's Ex'rs v. Hyde*, 64 N. J. Eq. 6 (such religious, charitable or other purposes as T may deem advisable); *Hegeman's Ex'rs v. Roome*, 70 N. J. Eq. 562 (religious, benevolent

and charitable objects); *Owens v. Missionary Society*, 4 Kern. (N. Y.) 380 (to diffuse the blessings of education, civilization and Christianity).

In the following cases trusts were upheld as charitable: *Re Best*, [1904] 2 Ch. 354 (such charitable and benevolent institutions as T shall determine); *Re Pardoe*, [1906] 2 Ch. 184 (to such public charities and institutions or for such charitable purposes as T shall consider fitting); *Re Garrard*, [1907] 1 Ch. 382 (to the vicar and church wardens for the time being of K. to be applied by them in such manner as they shall in their sole discretion think fit); *Re Salter*, [1911] 1 I. R. 289 (to such other charitable or religious purposes for the benefit of members of the Church of Ireland within the county of C); *Rickerby v. Nicholson*, [1912] 1 I. R. 343 (such religious or charitable purposes as T shall think fit); *Paterson's Trustees v. Paterson*, [1909] S. C. 485 (such charities or benevolent or beneficent institutions as T shall think proper); *M'Phee's Trustees v. M'Phee*, [1912] S. C. 75 (such religious and charitable institutions in Glasgow as T may select); *Wordie's Trustees v. Wordie*, [1915] S. C. 310 (charitable institutions for the benefit of women and children); *Cameron's Trustees v. Mackenzie*, [1915] S. C. 313 (such charitable institutions, persons or objects as T may think desirable); *Bannerman's Trustees v. Bannerman*, [1915] S. C. 398 (religious or charitable institutions conducted according to Protestant principles); *Re Hinckley*, 58 Cal. 457 (human beneficence and charity); *Welch v. Caldwell*, 226 Ill. 488 (charitable and religious purposes in the discretion of T); *Everett v. Carr*, 59 Me. 325 (for charitable purposes, for the greatest relief of human suffering, human wants, and for the good of the greatest number); *Fox v. Gibbs*, 86 Me. 87 (benevolent and charitable purposes at T's discretion); *Saltonstall v. Sanders* 11 Allen (Mass.) 446 (to the furtherance and promotion of the cause of piety, and good morals, or in aid of objects and purposes of benevolence or charity, public or private); *Wells v. Doane*, 3 Gray (Mass.) 201 (to such charities as shall be deemed by T most useful); *Rotch v. Emerson*, 105 Mass. 431 (for the promotion of agricultural or horticultural improvements, or other philosophical or philanthropic purposes, at T's discretion); *Suter v. Hilliard*, 132 Mass. 412 (to assist poor persons and to assist or coöperate with such charitable, benevolent, religious, literary and scientific associations as T shall think most deserving); *Weber v. Bryant*, 161 Mass. 400 (such objects of benevolence and charity, public or private, including educational or charitable institutions and the relief of individual need as T deems worthy); *Gill v. Attorney General*, 197 Mass. 232 (among charitable institutions, persons or objects); *St. James Orphan Asylum v. Shelby*, 60 Neb. 796 (to some charity according to T's judgment); *DeCamp v. Dobbins*, 29 N. J. Eq. 36, 31 N. J. Eq. 671 (to a religious society for missionary, educational and benevolent purposes); *Claypool v. Norcross*, 42 N. J. Eq. 545 (charitable purposes in a liberal way); *Rothschild v. Schiff*, 188 N. Y. 327 (to the creation of some charitable or educational institution in New York); *Matter of Cunningham* 206 N. Y. 601 (to such charitable and benevolent associations and institutions of learning as T may select); *Miller v. Teachout*, 24 Oh. St. 525 (to the advancement of the Christian religion in T's judgment); *Re Murphy's Estate*, 184 Pa. 310 (to be divided among such benevolent, charitable and religious institutions and associations as shall be selected by T); *Re Dulles's Estate*, 218 Pa. 162 (among such religious, charitable and benevolent purposes and objects or institutions as in T's discretion shall be best and proper); *Re*

Kimberly's Estate, 249 Pa. 469 (such charitable uses, objects and purposes as T may select); Pell v. Mercer, 14 R. I. 412 (such works of religion and benevolence as T shall select); Selleck v. Thompson, 28 R. I. 350 (such charitable purposes as T shall judge will do the most real good); *Re Stewart's Estate*, 26 Wash. 32 (such charitable purpose and uses as T may deem fit).

In *Re Gibbon*, [1917] 1 I. R. 448, a bequest was made by a Catholic clergyman to his executors, also clergymen, to dispose of "to my best spiritual advantage, as conscience and sense of duty may direct." It was held that although this was not a charitable trust nor a beneficial gift to the executors, yet the executors might perform if willing. "It is true that there is no living *cestui que trust* who can enforce it. . . . The Court is not asked to compel the enforcement of this trust and the executors are willing to carry it out; and I can see no sufficient ground for refusing to allow them to effectuate, as they propose to do, the expressed intentions of the testator."

In a few cases it has been held that a power to appoint for general non-charitable purposes is invalid. *Bannerman's Trustees v. Bannerman*, [1915] S. C. 398, p. 409 ("A proprietary power cannot be too general, whereas a fiduciary power is invalid unless the description of the class to be benefited is 'sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator' or other creator of the power."); *Norris v. Thomson*, 19 N. J. Eq. 307, 20 N. J. Eq. 489; *Tilden v. Green*, 130 N. Y. 29; *Heiss v. Murphey*, 40 Wis. 276. But see 5 Harv. L. Rev. 395; 15 Harv. L. Rev. 512.

On the general subject of non-charitable trusts without definite beneficiaries, see Ames, *Failure of the Tilden Trust*, 5 Harv. L. Rev. 389; *Lect. Leg. Hist.*, 285; Gray, *Gifts for a Non-charitable Purpose*, 15 Harv. L. Rev. 509; Gray, *Rule ag. Perp.*, App. H. See also 33 L. Quar. Rev. 356-360.

NORMAN v. PRINCE.

SUPREME COURT, RHODE ISLAND. 1917.

40 R. I. 402.

SWEETLAND, J. This is a suit in equity brought by the trustees under the will of George H. Norman, late of Newport, for the construction of said will and for instructions.

The questions involved relate to the construction of the provisions contained in the twelfth clause of said will. By said clause the testator devises and bequeaths his residuary estate to his son George H. Norman, Jr., and his heirs in trust. By the terms of the trust the trustee is directed to dispose of the net income of the trust estate as follows: (1) To pay from said net income the sum of \$20,000 annually to the testator's wife, Abby D. K. Norman, in equal quarter yearly installments; (2) to divide the residue of said net income into nine

equal shares, and as often as once in six months to pay one of said shares to each of eight of the testator's nine children, excluding from said provision the testator's son Hugh K. Norman, and upon the decease of each of said eight children to pay the share of income to which said child would have been entitled as said child shall by will appoint, in default of appointment, to the lawful issue of said child, and in default of appointment and issue, to the testator's then next of kin, omitting and excluding, however, the testator's son Hugh and his descendants, if any; and (3) to pay the remaining or ninth share of income in whole or in part at such time or times as the trustee shall select to testator's said son Hugh or to Hugh's wife or to any child or children of Hugh or to any other person or persons whomsoever, as the trustee for the time being in the uncontrolled absolute discretion or pleasure of said trustee shall see fit.

In said will the testator directs that upon the decease of the survivor or his widow and all of his nine children and when the youngest living grandchild shall have reached 21 the whole principal of said trust shall be divided by the trustee into eight equal shares, said shares to be set apart so that they shall appertain or relate to said eight children, one share to each child, each share so appertaining to each child to be paid absolutely and in fee simple, free from every trust, as said child may by will appoint, in default of appointment, to the lawful issue of said child, and in default of appointment and issue, to the testator's then next of kin; the descendants of said Hugh, however, being specifically excepted.

It was further provided in said will that said George H. Norman, Jr., might at any time or times appoint one or two persons to act as trustee or trustees under said will, both with him and after he should have ceased to act as trustee by death or otherwise, and they and the survivor of them and every other person appointed under the provisions of said will should have every right, power, privilege, and authority conferred by said will on George H. Norman, Jr., as trustee.

George H. Norman, Jr., duly qualified and acted as sole trustee under said will until February 13, 1908, upon which date, in accordance with the provision of the will, he duly appointed his brothers Guy Norman and Maxwell Norman as trustees to carry out said trust. On said February 13, 1908, the said George H. Norman, Jr., died, and since that date the said Guy and Maxwell Norman, the complainants here, have acted and

are now acting as trustees. On October 30, 1900, the said Hugh K. Norman died, leaving no issue. His widow, who was the sole beneficiary under his will, and who was duly appointed administratrix with the will annexed of his estate, individually and as such administratrix has executed a release of all claims to the estate of the testator, George H. Norman. Abby D. K. Norman, widow of George H. Norman, the testator, died on September 6, 1915. Certain of the grandchildren of the testator have not yet reached the age of 21 years.

The present trustees and their predecessor as trustee, said George H. Norman, Jr., up to the time of the decease of the testator's widow made the annual payments from income to her in accordance with the provisions of the will, and also, as directed, paid the share of income to each of the eight children of the testator named in his will as aforesaid, the share of income of George H. Norman, Jr., being paid after his death to the appointees under his will; also said trustees distributed said ninth share of income from time to time in varying amounts and proportions with the knowledge, consent, and acquiescence of the defendants to the widow and children of the testator, including Hugh K. Norman and said George H. Norman, Jr., during their respective lives, and after their respective deaths to the widow and surviving children of the testator, to the widow of Hugh K. Norman, and to the appointees of income of said George H. Norman, Jr.¹ . . .

As to the second question presented by the bill, we are of the opinion that the provision relating to the disposition of the ninth share of income is valid and amounts to the creation of an absolute power of disposition. The will provides for the payment of said ninth share of the residuary income "as the trustee hereof for the time being in the uncontrolled absolute discretion or pleasure of said trustee shall see fit." Said provision imposes no trust or obligation with respect to the disposition of said ninth share of income. By the twelfth clause of said will the testator's residuary estate is given to his son George H. Norman, Jr., in trust. As trustee the said George H. Norman, Jr., or the trustees for the time being, are directed to pay \$20,000 of the net income of said trust estate annually to the widow, to make division of the residue of said income into nine shares,

¹ A part of the opinion in which it was held that on the death of the widow her annuity should go with the residuary income is omitted.

and to pay eight of said shares to persons definitely designated. From the very broad language of the provision as to the disposition of the said ninth share of net income the testator's intent can readily be found not to bequeath said share in trust for indefinite beneficiaries; but the provision should be regarded rather as a bequest of said share to the trustees with an arbitrary power of disposition. The use of the words "trustee" and "trustees" in this clause of the will is not controlling as to his or their character in the disposition of said ninth share, but said words must be regarded as descriptive. In *Gibbs v. Rumsey*, 2 Ves. & B. 294, the testatrix bequeathed certain estate, real and personal, to two persons named upon trust to sell; and, after making certain bequests out of the money derived from such sale the testatrix, "proceeded thus, 'I give and bequeath all the rest and residue of the moneys arising from the sale of my estate and all the residue of my personal estate after payment of my debts, legacies and funeral expenses and the expenses of proving this my will unto my said trustees and executors (the said Henry Rumsey and James Rumsey) to be disposed of unto such person and persons and in such manner and form and in such sum and sums of money as they in their discretion shall think proper and expedient.'" The Master of the Rolls held that this provision created a purely arbitrary power of disposition according to a discretion which no court can either direct or control, and not a trust for an indefinite purpose. Although the testator in the case at bar has coupled this power of disposition of a portion of the income of the trust estate with certain trust provisions, we feel warranted in construing this provision as we have in accordance with the testator's obvious intent. See 5 *Harvard Law Review*, 389.

We accordingly approve the action of George H. Norman, Jr., and of the complainant trustees in the disposition which he and they have made of said ninth share of income. We instruct said trustees that the net income of the trust estate arising after the death of the testator's widow shall be divided into nine equal shares, that eight of said shares are to be disposed of in accordance with the provisions of said twelfth clause of the will, and that the remaining share is held by the trustees to be disposed of by them in their discretion in accordance with the power of disposition given to them by the testator. We

also find that the provision relating to said power of disposition is valid.

On July 2d the parties may present to us a form of decree in accordance with this opinion.¹

MUSSETT v. BINGLE.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1876.

W. N. (1876) 170.

IN this cause, which now came on upon further consideration, the testator had by his will directed his executors to apply 300*l.* in erecting a monument to his wife's first husband, and also to invest 200*l.* and apply the interest in keeping up the monument. It was admitted that the latter direction was bad, and the question argued was whether the former direction was good.

The trustees were ready to carry out the testator's wishes, but some of the beneficiaries contended that the first direction was void as purely "honorary."

THE VICE CHANCELLOR [HALL] said that the direction to the executors was a perfectly good one, and one which they were ready to perform, and it must be performed accordingly.²

¹ *Gibbs v. Rumsey*, 2 V. & B. 294 (to executors to be disposed of unto such person and persons and in such manner and form and in such sum and sums of money as they in their discretion shall think proper and expedient); *Higginson v. Kerr*, 30 Ont. L. Rep. 62 (I desire that my executors shall have full power to dispose of the residue as they in their judgment may deem best); *Re Perkins*, 68 N. Y. Misc. 255; *Ralston v. Telfair*, 2 Dev. Eq. (N. C.) 255 (to executors to dispose of as they may think fit), *accord*.

In the following cases a resulting trust was imposed: *Fowler v. Garlike*, 1 Russ. & Myl. 232 (to executors upon trust to dispose of for such uses and purposes as they shall think fit); *Ellis v. Selby*, 1 Myl. & Cr. 286 (to executors for such charitable or other purposes as they shall think fit, without being accountable to any person); *Buckle v. Bristow*, 10 Jur. (n. s.) 1095; *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381 (to executors in trust that they, their heirs, successors, etc., may apply in such manner and to such parties as to them may appear just); *Fenton v. Nevin, Jr.* L. R. 31 Ch. 478 (to executors to apply as they think fit); *Anderson v. Smoke*, 25 Ses. Cas. 493 (to A and B to dispose of in any way they should think proper); *Haskell v. Staples*, 116 Me. 103 (to A in trust to be distributed as he pleases); *Davison v. Wyman*, 214 Mass. 192 (to A to dispose of in his absolute discretion and according to his own judgment). See 37 L. R. A. (n. s.) 400; L. R. A. 1917D 821; 31 Harv. L. Rev. 661.

² *Pirbright v. Salwey*, W. N. (1896) 86; *Re Koppikus' Estate*, 1 Cal. App. 54; *Angus v. Noble*, 73 Conn. 56 (care of graves during lives of persons in

REICHENBACH *v.* QUIN.

HIGH COURT OF JUSTICE, CHANCERY DIVISION, IRELAND. 1888.

21 L. R. Ir. 138.

JANE COWLEY, by her will, dated the 30th October, 1881, devised and bequeathed all her property to the defendants, upon the trusts therein declared; and, after giving certain other directions in respect thereof, proceeded: "And whatever interest I have in the lands of Newcastle, County Dublin, being); *Mason v. Bloomington Library Ass'n*, 237 Ill. 442; *Leonard v. Hawthorth*, 171 Mass. 496 (monument for testator's widow, she surviving him); *Detwiller v. Hartman*, 37 N. J. Eq. 347 (\$40,000 monument to testator); *St. Stephen's Church v. Morris*, 115 Va. 225, *accord*. Cf. *Morrow v. Durant*, 140 Iowa 437; *Hornberger v. Hornberger*, 12 Heisk. (Tenn.) 635. But cf. *M'Caig v. Univ. of Glasgow*, [1907] S. C. 231; *M'Caig's Trustees v. Kirk-Session*, [1915] S. C. 426.

In the absence of a statute, a trust for the upkeep of a grave or tomb is invalid if it is to continue longer than the period of perpetuities. *Dawson v. Small*, L. R. 18 Eq. 114; *Re Rogerson*, [1901] 1 Ch. 715; *Re Gray's Estate*, 128 Cal. 552; *Burke v. Burke*, 259 Ill. 262; *Phillips v. Heldt*, 33 Ind. App. 388; *Van Syckel v. Johnson*, 80 N. J. Eq. 117; *Smart v. Town of Durham*, 77 N. H. 56. Cf. *Re Gassiot*, 70 L. J. Ch. 242 (bequest to keep a portrait in repair). See Ames, 201n. Although such a disposition does not violate the Rule against Perpetuities properly so-called (Gray, Rule ag. Perp., sec. 898), the principle involved rests on the same public policy which underlies that Rule and the period is the same as that of the Rule. But a gift over from one charity to another on failure to keep a grave or monument in repair is valid. *Re Tyler*, [1891] 3 Ch. 253; *Roche v. M'Dermott*, [1904] 1 I. R. 394. See *Re Davies*, [1915] 1 Ch. 543.

A bequest for the upkeep of a public cemetery or one attached to a church is charitable. *Re Vaughan*, 33 Ch. D. 187; *Re Manser*, [1905] 1 Ch. 68 (for use of Quakers); *Re Barker*, 25 T. L. R. 753 (tablet in cathedral crypt). See *Driscoll v. Hewlett*, 198 N. Y. 297. See also *Re Pardoe*, [1906] 2 Ch. 184 (trust to erect headstones for graves of almshouse pensioners).

A trust to erect and maintain a monument to a public character may be charitable. *M'Caig's Trustees v. Kirk-Session*, [1915] S. C. 426 (local celebrity). Cf. *Gilmer v. Gilmer*, 42 Ala. 9; *Smith's Estate*, 5 Pa. Dist. Ct. 327. But see *Re Jones*, 79 L. T. R. 154 (John Locke).

By statute in many jurisdictions, trusts for the repair of tombs or monuments or for the upkeep of graves are made charitable. See *Hewitt v. Wheeler School*, 82 Conn. 188; *Mason v. Bloomington Library Ass'n*, 237 Ill. 442; *Ford v. Ford's Ex'r.*, 91 Ky. 572; *Tate v. Woodyard*, 145 Ky. 613; *Bartlett, Petitioner*, 163 Mass. 509; *Morse v. Inhabitants of Natick*, 176 Mass. 510; *Rollins v. Merrill*, 70 N. H. 436; *Matter of Lyon*, 173 N. Y. App. Div. 473. See also Ohio Gen. Code (1910), sec. 10,110.

See Ames, 201n.; 1 Brit. Rul. Cas. 931; 11 Corp. Jur. 324.

and in the premises in Bridgefoot Street, Dublin, now forming a portion of Darcy's Brewery, I direct that the same shall be sold after my decease, if not previously disposed of, and out of the amount realized thereby, after payment of the expenses of such sale, I direct my trustees to apply 100*l.* towards having masses offered up in public in Ireland for the repose of my soul and the souls of my father, mother, brother, and sisters, and of my servant Anne Hagarty, and apply the balance towards such charitable purposes in Ireland as my trustees shall select." And the testatrix appointed the defendants executors of her said will.

The testatrix died on the 16th June, 1882, and on the 24th July, 1882, probate of her will was granted to the defendants.

Anne Hagarty survived the testatrix.

An action was brought by certain legatees under the said will, for the purpose of having the trusts thereof carried out and the personal estate of the testatrix administered, and a decree was, on the 4th March, 1885, made to that effect.

The case now came before the Court on further consideration of the Chief Clerk's certificate, and a question arose as to the validity of the bequest for masses.

THE VICE CHANCELLOR [CHATTERTON]. I am of opinion that there is no attempt to create a perpetuity by the trust in reference to the 100*l.* for masses. There is a direction in the will that the lands of Newcastle and the testatrix's premises in Bridgefoot Street should be sold, and that out of the amount realized her trustees should apply 100*l.* towards having masses offered up in public in Ireland for the repose of her soul and the souls of the other persons mentioned.

I do not consider that there is any attempt here to create a perpetuity, and on that ground — and I wish it to be understood that on that point only I give a decision — I shall declare that the gift is valid.¹

¹ In many jurisdictions it is held that a trust for the saying of masses is charitable. *O'Hanlon v. Logue*, [1906] 1 I. R. 247 (masses to be said in public); *Hoeffer v. Clogan*, 171 Ill. 462; *Gilmore v. Lee*, 237 Ill. 402; *Ackerman v. Fichter*, 179 Ind. 392 (all poor souls); *Seda v. Huble*, 75 Iowa 429 (but see *Moran v. Moran*, 104 Iowa 216); *Schouler*, Petitioner, 134 Mass. 426; *Webster v. Sughrw*, 69 N. H. 380; *Kerrigan v. Tabb* (N. J. Eq.), 39 Atl. 701; *Matter of Eppig*, 63 N. Y. Misc. 613; *Matter of Welch*, 105 N. Y. Misc. 27; *Rhymer's Appeal*, 93 Pa. 142 (*semble*); *Will of Kavanaugh*, 143 Wis. 90 (an interesting case, overruling *McHugh v. McCole*, 97 Wis. 166).

In the following cases it was held that a bequest for the saying of masses

In re DEAN.

COOPER-DEAN *v.* STEVENS.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1889.

41 Ch. D. 552.

WILLIAM CLAPCOTT DEAN, by his will dated the 12th of November, 1887, devised all his freehold estates, subject to and charged with certain annuities, and with an annuity of 750*l.* thereafter mentioned to his trustees, and to a term of fifty years thereafter granted to his trustees, to the use of his trustees, for the term of one year from the day preceding his death, upon certain trusts, and, subject thereto, to the use of James Cooper (the plaintiff) for his life, with remainder to the use of the plaintiff's first and other sons, successively in tail male, with remainders over. The will continued: "I give to my trustees my eight horses and ponies (excluding cart horses) at Littledown, and also my hounds in the kennels there. And I charge my said freehold estates hereinbefore demised and devised, in priority to all other charges created by this my will, with the payment to my trustees for the term of fifty years commencing from my death, if any of the said horses and hounds shall so long live, of an annual sum of 750*l.* And I declare

is not charitable and is therefore invalid if involving a perpetuity: *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381; *Dorrian v. Gilmore*, 15 L. R. Ir. 69; *Small v. Torley*, 25 L. R. Ir. 388; *Re Zeagman*, 37 Ont. L. Rep. 536 (for the souls of the testator and his descendants).

In the principal case, a trust for the saying of masses was upheld although not regarded as charitable: *Elmsley v. Madden*, 18 Grant 386; *Re Zeagman*, 37 Ont. L. Rep. 536 (valid as to immediate masses; invalid as to perpetual masses); *Re Lennon's Estate*, 152 Cal. 327 (valid and not within statute restricting gifts for charitable purposes); *Moran v. Moran*, 104 Iowa 216; *Beidler v. Dehner*, 178 Iowa 1338; *Sherman v. Baker*, 20 R. I. 446 (particular priest regarded as beneficiary). See *Ames*, 210*n.*

In the following cases a bequest for the saying of masses was held invalid because of the lack of a beneficiary: *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327; *Holland v. Alcock*, 108 N. Y. 312 (prior to Tilden Act; but see *contra* as to a gift *inter vivos*, *Gilman v. McArdle*, 99 N. Y. 451); *McHugh v. McCole*, 97 Wis. 166 (but see Will of Kavanaugh, 143 Wis. 90).

In England it is held that a trust for the saying of masses is illegal as a superstitious use. *West v. Shuttleworth*, 2 Myl. & K. 684, 697; *Heath v. Chapman*, 2 Drew. 417; *Re Blundell's Trusts*, 30 Beav. 360; *Re Egan*, [1918] 2 Ch. 350.

that my trustees shall apply the said annual sum payable to them under this clause in the maintenance of the said horses and hounds for the time being living, and in maintaining the stables, kennels, and buildings now inhabited by the said animals in such condition of repair as my trustees may deem fit; but this condition shall not imply any obligation on my trustees to leave the said stables, kennels, and buildings in a state of repair at the determination of the said term; but I declare that my trustees shall not be bound to render any account of the application or expenditure of the said sum of 750*l.*, and any part thereof remaining unapplied shall be dealt with by them at their sole discretion." . . .

The testator died on the 3d of December, 1887. This was an originating summons by James Cooper, who had assumed the name of Dean, as plaintiff, against the trustees of the will, asking a declaration that the gift of the 750*l.* a year to the defendants for the purposes mentioned in the will was invalid, or, in the alternative, a declaration that the plaintiff was entitled under the trusts of the will to the balance from time to time in any year, commencing from the testator's death, of the 750*l.*, after making provision for the maintenance of the testator's horses, hounds, stables, kennels and buildings mentioned in his will.

NORTH, J. The first question is as to the validity of the provision made by the testator in favour of his horses and dogs. It is said that it is not valid; because (for this is the principal ground upon which it is put) neither a horse nor a dog could enforce the trust; and there is no person who could enforce it. It is obviously not a charity, because it is intended for the benefit of the particular animals mentioned and not for the benefit of animals generally, and it is quite distinguishable from the gift made in a subsequent part of the will to the Royal Society for the Prevention of Cruelty to Animals, which may well be a charity. In my opinion this provision for the particular horses and hounds referred to in the will is not, in any sense, a charity, and, if it were, of course the whole gift would fail, because it is a gift of an annuity arising out of land alone. But, in my opinion, as it is not a charity, there is nothing in the fact that the annuity arises out of land to prevent its being a good gift.

Then it is said, that there is no *cestui que trust* who can enforce the trust, and that the Court will not recognize a trust unless it

is capable of being enforced by some one. I do not assent to that view. There is not the least doubt that a man may, if he pleases, give a legacy to trustees, upon trust to apply it in erecting a monument to himself, either in a church or in a churchyard, or even in unconsecrated ground, and I am not aware that such a trust is in any way invalid, although it is difficult to say who would be the *cestui que trust* of the monument. In the same way, I know of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument. In my opinion such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities, it would be illegal. But a trust to lay out a certain sum in building a monument, and the gift of another sum in trust to apply the same to keeping that monument in repair, say for ten years, is, in my opinion, a perfectly good trust, although I do not see who could ask the Court to enforce it. If persons beneficially interested in the estate could do so, then the present plaintiff can do so; but if such persons could not enforce the trust, still it cannot be said that the trust must fail because there is no one who can actively enforce it.

Is there then anything illegal or obnoxious to the law in the nature of the provision, that is, in the fact that it is not for human beings, but for horses and dogs? It is clearly settled by authority that a charity may be established for the benefit of horses and dogs, and therefore the making of a provision for horses and dogs, which is not a charity, cannot of itself be obnoxious to the law, provided, of course, that it is not to last for too long a period. Then there is what I consider an express authority upon this point in *Mitford v. Reynolds*, 16 Sim. 105. . . . I think I may treat that case as a decision by very high authority that such a provision is good, and, if I had felt any doubt about the point myself, I should have considered that authority as settling it, so far as I am concerned. There is nothing, therefore, in my opinion, to make the provision for the testator's horses and dogs void.

Then the next question is this: the gift is of an annuity of 750*l.*, during the lives and life (to put it shortly) of the horses and dogs, and the survivors or survivor of them, and of course a time would arrive when the provision which the testator thought right to make for all the animals would be much more

than sufficient for the three or the two or the one which might survive. The annuity is to cease entirely when the last survivor dies, and it is obvious that nothing like that sum could or would be applied for the benefit of the animals when they became greatly reduced in number. The question is, whether the annuity was given to the trustees beneficially. In my opinion it was not given to them beneficially. They are from beginning to end called "the trustees," and beyond all question the principal trust to be discharged by them under the will is that relating to the horses and dogs. There was, no doubt, the management trust, and that was a serious trust while it lasted, but it came to an end at the close of a year after the testator's death. These persons are described throughout as "trustees," and the annuity is given to them as trustees, and in my opinion they took it only as trustees, for the purpose of giving effect to the trust declared of it, and they did not themselves take any beneficial interest in it. The trust is for payment to the trustees. Then there is a declaration that the trustees shall apply the annual sum payable to them in the maintenance of the horses and dogs. They have a discretion as to the repair of the buildings, but they are not under any obligation to leave the buildings in a state of repair at the end of the term. Then come the words: "Any part thereof remaining unapplied shall be dealt with by them at their sole discretion." If the testator had meant them to take beneficially, it would have been very easy to say that "any surplus, after satisfying the aforesaid purposes, shall be divided among them for their own use." But the testator does nothing of that sort. He treats them as having a joint interest. The annuity is to be applied by them, it is to be subject to a discretion to be exercised by them, and, in my opinion, looking at the whole of the will, it was not intended to vest the annuity in them beneficially, but only to give them a discretion with respect to it as trustees. I have omitted to read these words, which form part of the sentence: "I declare that my trustees shall not be bound to render any account of the application or expenditure of the said sum of 750*l.*, and any part thereof remaining unapplied shall be dealt with by them at their sole discretion." In my opinion the testator intended by these words to give them complete latitude as to the keeping up of the stables and kennels for the horses and dogs, and as to the provision to be made for them; in other words, he intended that it should not be open to any one to say

BROWN v. BURDETT.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1882.

W. N. (1882) 134.¹

TESTATRIX by a codicil, dated the 26th of September, 1868, to her will (dated the 22d of May, 1868), revoked a devise of a messuage, garden, orchard, and out-buildings at Gilmorton, Leicestershire, and gave and devised the same, and the furniture therein, to three trustees upon trust, immediately after her funeral, and upon the same day, to cause the windows and doors of each room in the house (except the kitchen, back kitchen, middle attic, and hall), and of the coach-house, to be well and effectually bricked up from the outside, with every article of whatever kind that might be therein (including testatrix's clock), and cause the same to be repaired and renewed as occasion should require, and so bricked up to continue for the term of twenty years next after her decease; and subject to the trusts aforesaid, upon trust, to place in and remove at pleasure some respectable married couple in the occupation of the rooms excepted as above, and allow them to live therein, and occupy the same place and premises rent-free, in consideration of their taking care of the messuage and premises, and particularly the blockade to the doors and windows, and to see that the same were in no wise tampered or meddled with. From and after the expiration of the term of twenty years, testatrix devised the house and premises to a devisee for life, with remainder to another person in fee. By another codicil, dated the 22d of May, 1871, testatrix gave a number of other minute directions as to how the outside and inside doors, windows, and chimney tops were to be blocked up and covered in; and directed that the married couple should pay a nominal rent of one halfpenny a week.

Testatrix died on the 16th of January, 1872.

THE VICE-CHANCELLOR [BACON] held that there was an intestacy as to the term of twenty years in the house, garden, out-buildings, and furniture.²

¹ 21 Ch. D. 667, s. c.

² In *Kelly v. Nichols*, 17 R. I. 306, a bequest of a favorite clock of the testator to trustees with a direction that it should be kept in repair "so long as they might think it proper and practical" was held invalid.

In *M'Craig v. University of Glasgow*, [1907] S. C. 231, the court held invalid

KAIN v. GIBBONEY.

SUPREME COURT OF THE UNITED STATES. 1879.

101 U. S. 362.

APPEAL from the Circuit Court of the United States for the Western District of Virginia.

Eliza Matthews made a will, dated Dec. 9, 1854, which contained the following provision: —

"In the event that I may hereafter become a member of any of the religious communities attached to the Roman Catholic Church, and am such at the time of my death, then it is my will that all the foregoing bequests and legacies be void, and that my executors hereinafter named shall pay over the whole of the property or other thing, after disposing of the same for money, to the aforesaid Richard V. Wheelan, bishop as aforesaid, or his successor in said dignity, who is hereby constituted a trustee for the benefit of the community of which I may be a member, the said property or money to be expended by the said trustee for the use and benefit of said community."

After making her will, she became a member of an unincorporated religious community attached to the Roman Catholic

a trust for the purpose of erecting and maintaining forever artistic towers and monuments and statues of the testator and various members of his family on land devised by him. A similar bequest was held invalid in *M'Caig's Trustees v. Kirk-Session*, [1915] S. C. 426. In the former case, Lord Kyllachy said (p. 242): "I consider that if it is not unlawful, it ought to be unlawful, to dedicate by testamentary disposition, for all time, or for a length of time, the whole income of a large estate — real and personal — to objects of no utility, private or public, objects which benefit nobody, and which have no other purpose or use than that of perpetuating at great cost, and in an absurd manner, the idiosyncrasies of an eccentric testator. I doubt much whether a bequest of that character is a lawful exercise of the *testamenti factio*. Indeed, I suppose it would be hardly contended to be so if the purposes, say of the trust here, were to be slightly varied, and the trustees were, for instance, directed to lay the truster's estate waste, and to keep it so; or to turn the income of the estate into money, and throw the money yearly into the sea; or to expend the income in annual or monthly funeral services in the testator's memory; or to expend it in discharging from prominent points upon the estate, salvoes of artillery upon the birthdays of the testator, and his brothers and sisters. Such purposes would hardly, I think, be alleged to be consistent with public policy; and I am by no means satisfied that the purposes which we have here before us are in a better position."

Church, known as the "Sisters of Saint Joseph," and was such at the time of her death.

The will was admitted to probate in 1861.

Thereafter Wheelan brought this suit, in the court below, against said Elizabeth, to recover the residue of that estate, and alleged that said Robert had never invested the fund which he received as the trustee of Eliza, but had converted it to his own use, except the bond of Johnson.

Wheelan died, and John J. Kain having been duly appointed Bishop of Wheeling, the suit was revived in his name.

The bill was, on demurrer, dismissed, and Kain appealed to this court.¹

STRONG, J. The bequest which the complainant seeks to enforce by this bill was an attempted testamentary disposition under the law of Virginia, and the matter now to be determined is whether by that law it can be sustained. It may be conceded that, notwithstanding its uncertainty, a legacy given in the words of this will, if for a charity, would be held valid in England, and in most of the States of the Union. But we have now to inquire, What is the law of Virginia? The gift was made to "Richard V. Wheelan, Bishop of Wheeling, or to his successor in said dignity." It was, therefore, in effect, a gift to the office of the Bishop of Wheeling. Neither Bishop Wheelan, nor any bishop succeeding him, was intended to derive any private advantage from it. Nothing was intended to vest in him but the trust, and that was required to be executed by whomsoever should fill the office of bishop, only so long as he should fill it, and executed in his character of bishop, not as an individual. The bequest was practically to a bishopric, and as a bishop is not a corporation sole, it may be doubted whether, at the decease of the testatrix, there was any person capable of taking it. True it is, that generally a trust will not be allowed to fail for want of a trustee: courts of equity will supply one. But if it could be conceded that Wheelan was, in his lifetime, capable of taking the bequest, and that Bishop Kain is capable of taking and holding after the death of his predecessor, a greater difficulty is found in the uncertainty of the beneficiaries for whose use the trust was created. In the words of the will, they are a religious community, of which the testatrix contemplated she might die a member. She died a member of a religious community attached to the Roman Catholic Church,

¹ The statement of facts is abridged.

known as the "Sisters of St. Joseph." That is an unincorporated association, and it is the association as such, and not the individual members who composed it, when the testatrix died, which is declared to be the beneficiary. Nor is it the community attached to any local church which is designated, but a community attached to the Roman Catholic Church, wherever that church may exist. Its members must be constantly changing, and it must always be uncertain who may be its members at any given time. No member can ever claim any individual benefit from the bequest, or assert that she is a *cestui que trust*; and the community having no legal existence, can never have a standing in court to call the trustees to account. This bequest is, therefore, plainly invalid, unless it can be supported as a charity. And it is far from evident that it is a gift for charitable uses. It looks more like private bounty. Charity is generally defined as a gift for a public use. Such is its legal meaning. Here the beneficial interest is given to a religious community, but not declared to be for religious uses. There is nothing in the will to show that aid to the poor, or aid to learning, or aid to religion, or to any humane object was intended.¹ . . .

*Decree affirmed.*²

¹ A part of the opinion of the court is omitted in which it is held that even if the bequest were charitable, it nevertheless failed because under the law of Virginia charities were not upheld to a greater extent than ordinary trusts. The Virginia law on this point has now been changed by statute. Acts 1914, 414.

² A trust for an unincorporated non-charitable association is invalid if it is to continue for a longer period than twenty-one years after the expiration of lives in being at its creation. *Re Amos*, [1891] 3 Ch. 159 (trade union); *Re Clifford*, 28 T. L. R. 57, 81 L. J. Ch. 220 (society to preserve and improve angling facilities for the benefit of its members); *Stewart v. Greene*, 1 R. 5 Eq. 470 (religious society); *Morrow v. M'Conville*, 11 L. R. Ir. 236 (religious society), *accord*. But see the explanation of these cases in Gray, Rule ag. Perp., App. H.

In the following cases also the trust was held invalid: *Carne v. Long*, 2 DeG. F. & J. 75 (library association); *Re Dutton*, 4 Ex. D. 54 (Atheneum and Mechanics Institute); *Thomson v. Shakespear*, 1 DeG. F. & J. 399 (trust to preserve as a museum Shakespeare's house which was privately owned); *Browne v. King*, 17 L. R. Ir. 488 (trust for the benefit of tenantry of donor).

In re DRUMMOND.

ASHWORTH *v.* DRUMMOND.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1914.

[1914] 2 Ch. 90.

By his will, dated November 24, 1911, James Drummond . . . devised and bequeathed all his real and personal estate not thereby otherwise disposed of unto his trustees upon trust for sale and conversion, and, subject to the payments therein mentioned, to stand possessed of the residue of the moneys produced by such sale and conversion upon trust for the Old Bradfordians' Club, London (being a club instituted by Bradford Grammar School old boys), the receipt of the treasurer for the time being of the club to be a sufficient discharge to his trustees.

By a codicil to his will, dated December 2, 1911, the testator, after reciting, *inter alia*, the residuary devise and bequest, thereby declared that he desired that the said moneys should be utilized by the club for such purpose as the committee for the time being might determine, the object and intent of the bequest being to benefit old boys of the Bradford Grammar School residing in London or members of the club, and to enable the committee, if possible, to acquire premises to be used as a club-house for the use of the members, being old boys of the Bradford Grammar School, with power to the committee to make rules and regulations as to residence in or use of the same, and further that it was the object of the bequest that the moneys should be utilized in founding scholarships or otherwise in such manner as the committee for the time being should think best in the interests of the club, or the school.

The testator died on December 6, 1911, and his will with the codicil thereto was duly proved by the plaintiffs as the executors thereof, the other executor having renounced probate. . . .

Questions having arisen as to the true construction of the will and codicil in reference to . . . the effect of the gift of the residuary real and personal estate, an originating summons was taken out on December 3, 1913, by the trustees of the will for the determination of the questions. . . . The Old Bradfordians' Club was founded in 1899 to encourage social intercourse amongst the old boys of the Grammar School and had been managed by a committee elected by members of the club. On Janu-

ary 3, 1913, the defendant company the Old Bradfordians' Club (London), Limited, was registered under the Companies Act, 1908, to take over the assets and property of the club, and the objects were precisely similar, the management of the club being vested in the committee.¹

EVE, J., said that he could not hold, as the result of the will and codicil together, that the residuary gift of realty and personalty for the Old Bradfordians' Club was a gift to the members individually. There was, in his opinion, a trust, but there was abundant authority for holding that it was not such a trust as would render the legacy void as tending to a perpetuity: *In re Clarke*, [1901] 2 Ch. 110. The legacy was not subject to any trust which would prevent the committee of the club from spending it in any manner they might decide for the benefit of the class intended. In his opinion, therefore, there was a valid gift to the club for such purposes as the committee should determine for the benefit of the old boys or members of the club.²

¹ The statement of facts is abridged and a part of the opinion is omitted.

² *Re Clarke* [1901] 2 Ch. 110 (association of veterans of the Crimean War), *accord.* In this case the court said (p. 114): "It is, I think, established by the authorities that a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be, will the legacy when paid be subject to any trust which will prevent the existing members of the association from spending it as they please? If not, the gift is good. So also if the gift is to be construed as a gift to or for the benefit of the individual members of the association. On the other hand, if it appears that the legacy is one which by the terms of the gift, or which by reason of the constitution of the association in whose favour it is made, tends to a perpetuity, the gift is bad."

A bequest for the individual members of a religious or other charitable organization as constituted at the time of the testator's death is valid but is not charitable. *Cocks v. Manners*, 12 Eq. 574; *Re Smith*, [1914] 1 Ch. 937; *Stewart v. Green*, 1 R. 5 Eq. 470; *Re Delany's Estate*, 9 L. R. Ir. 226; *Morrow v. M'Conville*, 11 L. R. Ir. 236; *Re Wilkinson's Trusts*, 19 L. R. Ir. 531; *Bradshaw v. Jackman*, 21 L. R. Ir. 12.

In England many clubs and similar associations have been registered under the provisions of Companies Act, 1867 (30 & 31 Vict. c. 131) sec. 23; Companies Consolidation Act, 1908 (8 Edw. VII c. 69) sec. 20. See 33 L. Quar. Rev. 356. See also Friendly Societies Act, 1875 (38 & 39 Vict. c. 60); Friendly Societies Act, 1896 (59 & 60 Vict. c. 25). In the United States there are usually general laws under which such associations may incorporate.

As to trusts for unincorporated associations, see further 3 Maitland, *Collected Papers*, 271-284, 321-404; Carr, *Corporations*, chap. 17; Wrightington, *Unincorporated Associations*; Smith, *Law of Associations*; Wertheimer, *Law of Clubs*; Laski, *Personality of Associations*, 29 Harv. L. Rev. 404.

STATUTE OF CHARITABLE USES.

43 Eliz. c. 4 (1601).

AN Act to redress the mis-employment of lands, goods and stocks of money heretofore given to certain charitable uses.

Whereas lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, have been heretofore given, limited, appointed and assigned, as well by the Queen's most excellent Majesty, and her most noble progenitors, as by sundry other well-disposed persons; some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen and persons decayed, and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes; which lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money, nevertheless have not been employed according to the charitable intent of the givers and founders thereof, by reason of frauds, breaches of trust, and negligence in those that should pay, deliver and employ the same: for redress and remedy whereof,

Be it enacted by authority of this present parliament, That it shall and may be lawful to and for the Lord Chancellor or Keeper of the Great Seal of England for the time being, and for the Chancellor of the Duchy of Lancaster for the time being for lands within the County Palatine of Lancaster, from time to time to award commissions under the Great Seal of England, or the Seal of the County Palatine, as the case shall require, into all or any part or parts of this realm respectively, according to their several jurisdictions as aforesaid, to the bishop of every several diocese and his Chancellor (in case there shall be any bishop of that diocese, at the time of the awarding of the same commissions), and to other persons of good and sound behaviour, authorizing them thereby, or any four or more of them, to enquire, as well by the oaths of twelve lawful men or more of the county, as by all other good and lawful ways and means,

of all and singular such gifts, limitations, assignments and appointments aforesaid, and of the abuses, breaches of trusts, negligences, mis-employments, not imploying, concealing, defrauding, mis-converting or mis-government of any lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money or stocks of money, heretofore given, limited, appointed or assigned, or which hereafter shall be given, limited, appointed or assigned, to or for any of the charitable and godly uses before rehearsed: and after the said commissioners or any four or more of them (upon calling the parties interested in any such lands, tenements, rents, annuities, profits, hereditaments, goods, chattels, money and stocks of money) shall make enquiry by the oaths of twelve men or more of the said county (whereunto the said parties interested shall and may have, and take their lawful challenge and challenges) and upon such enquiry, hearing and examining thereof, set down such orders, judgments and decrees, as the said lands, tenements, rents, annuities, profits, goods, chattels, money and stocks of money, may be duly and faithfully employed, to and for such of the charitable uses and intents before rehearsed respectively, for which they were given, limited, assigned or appointed by the donors and founders thereof: which orders, judgments and decrees, not being contrary or repugnant to the orders, statutes or decrees of the donors or founders, shall by the authority of this present parliament stand firm and good, according to the tenor and purport thereof, and shall be executed accordingly, until the same shall be undone or altered by the Lord Chancellor of England or Lord Keeper of the Great Seal of England, or the Chancellor of the County Palatine of Lancaster, respectively, within their several jurisdictions, upon complaint by any party grieved to be made to them.¹ . . .

THE TRUSTEES OF THE PHILADELPHIA
BAPTIST ASSOCIATION v. HART'S EXECUTORS.

SUPREME COURT OF THE UNITED STATES. 1819.

4 Wheat. 1.

IN the year 1790, Silas Hart, a citizen and resident of Virginia, made his last will in writing, which contains the following

¹ The provisions of this statute, *except the preamble*, were repealed by Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42).

bequest. "Item, what shall remain of my military certificates at the time of my decease, both principal and interest, I give and bequeath to the Baptist Association that for ordinary meets at Philadelphia annually, which I allow to be a perpetual fund for the education of youths of the Baptist denomination, who shall appear promising for the ministry, always giving a preference to the descendants of my father's family." In 1792 the legislature of Virginia passed an act, repealing all English statutes, including that of the 43 Eliz. c. 4. In the year 1795 the testator died. The Baptist Association, which met annually at Philadelphia, had existed as a regularly organized body for many years before the date of this will, and was composed of the clergy of several Baptist churches of different States, and of an annual deputation of laymen from the same churches. It was not incorporated until the year 1797, when it received a charter from the legislature of Pennsylvania, incorporating it by the name of "The Trustees of the Philadelphia Baptist Association." The executors having refused to pay the legacy, this suit was instituted in the Circuit Court for the district of Virginia, by the corporation, and by those individuals who were members of the Association at the death of the testator. On the trial of the cause, the judges of that Court were divided in opinion on the question, whether the plaintiffs were capable of taking under this will? Which point was, therefore, certified to this Court.

MARSHALL, C. J. It was obviously the intention of the testator that the Association should take in its character as an Association; and should, in that character, perform the trust created by the will. The members composing it must be perpetually changing; but, however they might change, it is "The Baptist Association that for ordinary meets at Philadelphia annually," which is to take and manage the "perpetual fund" intended to be created by this will. This Association is described with sufficient accuracy to be clearly understood; but, not being incorporated, is incapable of taking this trust as a society. Can the bequest be taken by the individuals who composed the Association at the death of the testator?

The Court is decidedly of opinion that it cannot. No private advantage is intended for them. Nothing was intended to pass to them but the trust; and that they are not authorized to execute as individuals. It is the Association for ever, not the individuals, who, at the time of his death, might compose the

Association, and their representatives, who are to manage this "perpetual fund."

At the death of the testator, then, there were no persons in existence who were capable of taking this bequest. Does the subsequent incorporation of the Association give it this capacity?

The rules of law compel the Court to answer this question in the negative. The bequest was intended for a society which was not at the time, and might never be, capable of taking it. According to law, it is gone for ever. The legacy is void; and the property vests, if not otherwise disposed of by the will, in the next of kin. A body corporate afterwards created, had it even fitted the description of the will, cannot divest this interest, and claim it for their corporation.

There being no persons who can claim the right to execute this trust, are there any who, upon the general principles of equity, can entitle themselves to its benefits? Are there any to whom this legacy, were it not a charity, could be decreed?

This question will not admit of discussion. Those for whose ultimate benefit the legacy was intended, are to be designated and selected by the trustees. It could not be intended for the education of all the youths of the Baptist denomination who were designed for the ministry; nor for those who were the descendants of his father, unless, in the opinion of the trustees, they should appear promising. These trustees being incapable of executing this trust, or even of taking it on themselves, the selection can never be made, nor the persons designated who might take beneficially.

Though this question be answered in the negative, we must still inquire, whether the character of this legacy, as a charity, will entitle it to the protection of this Court?

That such a legacy would be sustained in England, is admitted. But it is contended for the executors that it would be sustained in virtue of the statute of the 43d of Elizabeth, or of the prerogative of the crown, or of both; and not in virtue of those rules by which a Court of Equity, exercising its ordinary powers, is governed. Should these propositions be true, it is farther contended, that the statute of Elizabeth does not extend to the case, and that the equitable jurisdiction of the Courts of the Union does not extend to cases not within the ordinary powers of a Court of Equity.

On the part of the plaintiffs, it is contended, that the peculiar law of charities does not originate in the statute of Elizabeth.

Had lands been conveyed in trust, previous to the statute, for such purposes as are expressed in this will, the devise, it is said, would have been good at law; and, of consequence, a Court of Chancery would have enforced the trust in virtue of its general powers. In support of this proposition, it has been said, that the statute of Elizabeth does not even profess to give any validity to devises or legacies, of any description, not before good, but only furnishes a new and more convenient mode for discovering and enforcing them; and that the royal prerogative applies to those cases only where the objects of the trusts are entirely indefinite; as a bequest generally to charity, or to the poor.

It is certainly true, that the statute does not, in terms, profess to give validity to bequests acknowledged not before to have been valid. It is also true, that it seems to proceed on the idea that the trusts it is intended to enforce, ought, in conscience, independent of the statute, to be carried into execution. It is, however, not to be denied, that if, at the time, no remedy existed in any of the cases described, the statute gives one. A brief analysis of the act will support this proposition. . . .

The general principle, that a vague legacy, the object of which is indefinite, cannot be established in a court of equity, is admitted. It follows, that he who contends that charities formed originally an exception to the rule, must prove the proposition. There being no reported cases on the point anterior to the statute, recourse is had to elementary writers, or to the opinions given by judges of modern times.

No elementary writers sustain this exception as a part of the law of England. . . .

If, before the statute of Elizabeth, legacies like that under consideration would have been established, on information filed in the name of the Attorney General, it would furnish a strong argument for the opinion, that some principle was recognised prior to that statute, which gave validity to such legacies.

But although we find *dicta* of Judges, asserting that it was usual before the statute of Elizabeth, to establish charities, by means of an information filed by the Attorney General; we find no *dictum*, that charities could be established on such information, where the conveyance was defective, or the donation was so vaguely expressed, that the donee, if not a charity, would be incapable of taking; and the thing given would vest in the heir or next of kin. All the cases which have been cited, where

charities have been established, under the statute, that were deemed invalid independent of it, contradict this position.

In construing that statute, in a preceding part of this opinion, it was shown that its enactments are sufficient to establish charities not previously valid. It affords, then, a broad foundation for the superstructure which has been erected on it. And, although many of the cases go, perhaps, too far; yet, on a review of the authorities, we think they are to be considered as constructions of the statute not entirely to be justified, rather than as proving the existence of some other principle concealed in a dark and remote antiquity, and giving a rule in cases of charity which forms an exception to the general principles of our law. . . .

CERTIFICATE. This cause came on to be heard on the transcript of the record of the Court of the United States, for the Fifth Circuit, and the District of Virginia, and on the question therein stated, on which the Judges of that Court were divided in opinion, and which was adjourned to this Court, and was argued by counsel: On consideration whereof, this Court is of opinion, that the plaintiffs are incapable of taking the legacy for which this suit was instituted; which opinion is ordered to be certified to the said Circuit Court.¹

VIDAL *v.* GIRARD'S EXECUTORS.

SUPREME COURT OF THE UNITED STATES. 1844.

2 How. 127.

THIS case came up by appeal from the Circuit Court of the United States, sitting as a court of equity, for the eastern district of Pennsylvania.

The object of the bill filed in the court below was to set aside a part of the will of the late Stephen Girard, under the following circumstances: —

Girard, a native of France, was born about the middle of the last century. Shortly before the declaration of independence he came to the United States, and before the peace of 1783 was a resident of the city of Philadelphia, where he died, in December, 1831, a widower and without issue. Besides some real estate of small value near Bordeaux, he was, at his death, the owner of real estate in this country which had cost him upwards of \$1,700,-

¹ See the concurring opinion of Story, J., 3 Pet. (U. S.) 481.

000, and of personal property worth not less than \$5,000,000. His nearest collateral relations were, a brother, one of the original complainants, a niece, the other complainant, who was the only issue of a deceased sister, and three nieces who were defendants, the daughters of a deceased brother.

The will of Mr. Girard, with two codicils, was proved at Philadelphia on 31st of December, 1831.

After sundry legacies and devises of real property to various persons and corporations, the will proceeds thus:—

“XX. And, whereas, I have been for a long time impressed with the importance of educating the poor, and of placing them, by the early cultivation of their minds and the developments of their moral principles, above the many temptations, to which, through poverty and ignorance, they are exposed; and I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education, as well as a more comfortable maintenance, than they usually receive from the application of the public funds: . . . Now, I do give, devise and bequeath all the residue and remainder of my real and personal estate of every sort and kind wheresoever situate, (the real estate in Pennsylvania charged aforesaid,) unto ‘the Mayor, Aldermen, and Citizens of Philadelphia,’ their successors and assigns, in trust, to and for the several uses, intents, and purposes hereinafter mentioned and declared of and concerning the same. . . .

“XXI. And so far as regards the residue of my personal estate, in trust, as to two millions of dollars, part thereof, to apply and expend so much of that sum as may be necessary, in erecting, as soon as practicably may be, in the centre of my square of ground between High and Chestnut streets, and Eleventh and Twelfth streets, in the city of Philadelphia, (which square of ground I hereby devote for the purposes hereinafter stated, and for no other, for ever), a permanent college, with suitable out-buildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary in such an institution as I direct to be established, and in supplying the said college and out-buildings with decent and suitable furniture, as well as books and all things needful to carry into effect my general design. . . .

“When the college and appurtenances shall have been constructed, and supplied with plain and suitable furniture and

books, philosophical and experimental instruments and apparatus, and all other matters needful to carry my general design into execution, the income, issues, and profits of so much of the said sum of two millions of dollars as shall remain unexpended, shall be applied to maintain the said college according to my directions. . . .

"As many poor white male orphans, between the ages of six and ten years, as the said income shall be adequate to maintain, shall be introduced into the college as soon as possible; and from time to time as there may be vacancies, or as increased ability from income may warrant, others shall be introduced. . . .

"I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of the said college.

"In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but, as there is such a multitude of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce; my desire is, that all the instructors and teachers in the college shall take pains to instil into the minds of the scholars the purest principles of morality, so that, on their entrance into active life, they may, from inclination and habit, evince benevolence towards their fellow-creatures, and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer. . . . "

By an act, passed on the 4th of April, 1832, entitled "A supplement to the act entitled 'An act to enable the Mayor, Aldermen, and Citizens of Philadelphia, to carry into effect certain improvements, and to execute certain trusts,'" the Select and Common Council of the city of Philadelphia, are authorized to provide by ordinance, or otherwise, for the election or appointment of such officers or agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the will of the late Stephen Girard. . . .

Under the act of 1832, the corporation of Philadelphia passed an ordinance providing for the building of the college, and the board of trustees created thereby was organized in March,

1833. The building was commenced and carried on from year to year under the direction of the authorities appointed in this ordinance.

On the 28th April, 1841, the cause came on for hearing in the Circuit Court upon the bill, amended bill, and bill of revivor, answers, replications, depositions, and exhibits, when, after argument of counsel, it was ordered, adjudged, and decreed, that the complainants' bill be dismissed with costs.

The complainants appealed to this court.

STORY, J.¹ . . . We are, then, led directly to the consideration of the question which has been so elaborately argued at the bar, as to the validity of the trusts for the erection of the college, according to the requirements and regulations of the will of the testator. That the trusts are of an eleemosynary nature and charitable uses in a judicial sense, we entertain no doubt. Not only are charities for the maintenance and relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations given for the establishment of colleges, schools and seminaries of learning, and especially such as are for the education of orphans and poor scholars.

The statute of the 43 of Elizabeth, ch. 4, has been adjudged by the Supreme Court of Pennsylvania not to be in force in that state. But then it has been solemnly and recently adjudged by the same court, in the case of *Zimmerman v. Andres*, 6 W. & S. 218, that "it is so considered rather on account of the inapplicability of its regulations as to the modes of proceeding, than in reference to its conservative provisions." "These have been in force here by common usage and constitutional recognition; and not only these, but the more extensive range of charitable uses which chancery supported before that statute and beyond it." Nor is this any new doctrine in that court; for it was formally promulgated in the case of *Witman v. Lex*, 17 Serg. & Rawle, 88, at a much earlier period (1827).

¹ A part of the statement of facts and the exhaustive and learned arguments of Jones and Webster for the complainants and Binney and Sergeant for the defendants and a large part of the opinion of the court are omitted.

For interesting sidelights on the principal case which excited great interest at the time on account of the amount involved and the eminence of counsel, as well as the importance of the questions of law involved, see Binney, *Life of Horace Binney*, 213-234. For the arguments of the defendants' counsel in the principal case, see *Girard Will Case*, published in 1854 by order of the commissioners of the Girard estates.

Several objections have been taken to the present bequest to extract it from the reach of these decisions. In the first place, that the corporation of the city is incapable by law of taking the donation for such trusts. This objection has been already sufficiently considered. In the next place, it is said, that the beneficiaries who are to receive the benefit of the charity are too uncertain and indefinite to allow the bequest to have any legal effect, and hence the donation is void, and the property results to the heirs. And in support of this argument we are pressed by the argument that charities of such an indefinite nature are not good at the common law, (which is admitted on all sides to be the law of Pennsylvania, so far as it is applicable to its institutions and constitutional organization and civil rights and privileges) and hence the charity fails; and the decision of this court in the case of the trustees of the Philadelphia Baptist Association *v.* Hart's Executors, 4 Wheat. 1, is strongly relied on as fully in point. There are two circumstances which materially distinguish that case from the one now before the court. The first is, that that case arose under the law of Virginia, in which state the statute of 43 Elizabeth, ch. 4, had been expressly and entirely abolished by the legislature, so that no aid whatsoever could be derived from its provisions to sustain the bequest. The second is, that the donees (the trustees) were an unincorporated association, which had no legal capacity to take and hold the donation in succession for the purposes of the trust, and the beneficiaries also were uncertain and indefinite. Both circumstances, therefore, concurred; a donation to trustees incapable of taking, and beneficiaries uncertain and indefinite. The court, upon that occasion, went into an elaborate examination of the doctrine of the common law on the subject of charities, antecedent to and independent of the statute of 43 Elizabeth, ch. 4, for that was still the common law of Virginia. Upon a thorough examination of all the authorities and all the lights, (certainly in no small degree shadowy, obscure, and flickering,) the court came to the conclusion that, at the common law, no donation to charity could be enforced in chancery, where both of these circumstances, or rather, where both of these defects occurred. . . .

But very strong additional light has been thrown upon this subject by the recent publications of the Commissioners on the public Records in England, which contain a very curious and interesting collection of the chancery records in the reign of

Queen Elizabeth, and in the earlier reigns. Among these are found many cases in which the Court of Chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner that cases of charities where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in the Court of Chancery. In some of these cases the charities were not only of an uncertain and indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take. These records, therefore, do in a remarkable manner, confirm the opinions of Sir Joseph Jekyll, Lord Northington, Lord Chief Justice Wilmot, Lord Redesdale, and Lord Chancellor Sugden. Whatever doubts, therefore, might properly be entertained upon the subject when the case of the Trustees of the Philadelphia Baptist Association *v. Hart's Executors*, 4 Wheat. 1, was before this court (1819), those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded.

If, then, this be the true state of the common law on the subject of charities, it would, upon the general principle already suggested, be a part of the common law of Pennsylvania. It would be no answer to say, that if so it was dormant, and that no court possessing equity powers now exists, or has existed in Pennsylvania, capable of enforcing such trusts. The trusts would nevertheless be valid in point of law; and remedies may from time to time be applied by the legislature to supply the defects. It is no proof of the non-existence of equitable rights, that there exists no adequate legal remedy to enforce them. They may during the time slumber, but they are not dead.¹

But the very point of the positive existence of the law of charities in Pennsylvania, has been (as already stated) fully recognized and enforced in the state courts of Pennsylvania, as far as their remedial process would enable these courts to act. This is abundantly established in the cases cited at the bar, and especially by the case of *Witman v. Lex*, 17 Serg. & Rawle, 88, and that of *Sarah Zane's will*, before Mr. Justice BALDWIN and Judge HOPKINSON. In the former case, the

¹ See *Bartlet v. King*, 12 Mass. 537.

court said "that it is immaterial whether the person to take be *in esse* or not, or whether the legatee were at the time of the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects; or whether their corporate designation be mistaken. If the intention sufficiently appears in the bequest, it would be valid." In the latter case certain bequests given by the will of Mrs. Zane to the Yearly Meeting of Friends in Philadelphia, an unincorporated association, for purposes of general and indefinite charity, were, as well as other bequests of a kindred nature, held to be good and valid; and were enforced accordingly. The case, then, according to our judgment, is completely closed in by the principles and authorities already mentioned, and is that of a valid charity in Pennsylvania, unless it is rendered void by the remaining objection which has been taken to it.¹ . . .

Upon the whole, it is the unanimous opinion of the court, that the decree of the Circuit Court of Pennsylvania dismissing the bill, ought to be affirmed, and it is accordingly affirmed with costs.²

In *BASCOM v. ALBERTSON*, 34 N. Y. 584 (1866), the testator devised and bequeathed the residue of his property to five persons to be named as trustees by the Supreme Court of Vermont, to found and establish an institution for the education of females, to be located in Middlebury, Vt. The Court held the devise and bequest invalid. PORTER, J., speaking for the Court, said (p. 615):

"If it be true that charitable uses and trusts were not intended to be embraced in the broad and comprehensive language of these statutes,³ the omission to except them from the general terms of the prohibition would be inexplicable on any other theory, than that Benjamin F. Butler, John Duer and John C. Spencer, the commissioners charged with the duty of revision, were unmindful of an important branch of the law, with which

¹ The court held that the objection founded on the exclusion from the college of all ecclesiastics, missionaries and ministers of any sect was without merit.

² See *Perin v. Carey*, 24 How. (U. S.) 465; *Ould v. Washington Hospital*, 95 U. S. 303; *Russell v. Allen*, 107 U. S. 163; *Jones v. Habersham*, 107 U. S. 174; *Taylor v. Columbian University*, 226 U. S. 126.

³ Rev. Stat., 1830, Pt. 2, c. 1, tit. 2. See *ante*, p. 13.

professional labor and research had made them probably more familiar than any other three gentlemen who could have been selected among the leading jurists of their day; and who were dealing with a question on which the experience of centuries had poured its light. The statutory provisions they introduced were essentially organic. Their design was to limit the bounds within which trusts might be created, and to prohibit all perpetuities unauthorized by law, and deriving their sole sanction from individual will. The question was considered in the *Williams* case, [8 N. Y. 525], where the alternative presented was, whether the statute should bend to the bequest, or the bequest bend to the statute; and the practical effect of the ruling was, that the statute was made to bend, by holding that, for this purpose, a trust for a charitable use is neither a use nor a trust.

"This doctrine, if it can be upheld, would render practically nugatory the restraints which the law has imposed upon testators, and the restrictions inserted by the legislature in special charters, and in general laws for the incorporation of charitable societies. Its effect is to divert donations from institutions, incorporated for purposes of philanthropic and Christian benevolence, and to invite evasion of State regulation and avoidance of public scrutiny, by tendering to every private citizen the right to create a perpetuity for such purpose as to him may seem good, and to endue it with more than corporate powers and more than corporate immunity. It holds out to every testator the assurance that though he cannot withdraw his property from the operation of general laws by gifts to societies organized under State authority, which would vest at once in the donees for purposes of charity, he can thus withdraw it from statutory regulation and restrictions, by giving the legal title to trustees of his own appointment, and that he can exercise over the so-called charity and the trustees in perpetual succession, the authority of a supreme legislature, unrestrained by the general statutes regulating the creation and division of estates, limiting uses and trusts, and forbidding perpetuities unauthorized by law. It assures him that though he is prohibited by statute from making an effectual bequest to a chartered charitable society, unless the will containing it be executed at least two months before his decease, he may make it to a private trustee for like purposes on the day of his death; that though he is precluded from making to any existing charitable institution a

posthumous donation yielding an income of over ten thousand dollars a year, he may by will create a private institution, bearing his name and free from visitation or inspection, and bestow an endowment yielding an income of ten times that amount; that though he may not, if he has a wife, parent or child, give more than one-quarter or one-half of his estate to any charitable organization sanctioned by law, he may give the whole to a charity which has no sanction but his own. . . .

"The re-examination of the rulings in that case on the principal question involved, has led us to the clear conclusion, that in the light of antecedent and subsequent decisions, they cannot be upheld without subverting what we believe to be the law. We think the English system of indefinite charitable uses, if it ever existed in this State, fell with the repeal of the statute of Elizabeth and the mortmain acts; and we are also of opinion that gifts of this nature are within the scope and meaning, as well as the terms, of our statutes, forbidding perpetuities unauthorized by law."

THE FAILURE OF THE "TILDEN TRUST." — James Barr Ames.¹ The prominence of the testator, and the magnitude of the "Tilden Trust," which has recently miscarried, have aroused so general an interest that this seems a peculiarly fit time to consider the legal reasons for the failure of that and similar charitable bequests in New York.

Governor Tilden's will is summarized by the majority of the court in *Tilden v. Green*,² as follows: "I request you (the executors) to cause to be incorporated an institution to be called the 'Tilden Trust,' with capacity to maintain a free library and reading-room in the city of New York, and such other educational and scientific objects as you shall designate; and if you deem it expedient — that is, if you think it advisable and the fit and proper thing to do — convey to that institution all or such part of my residuary estate as you choose; and if you do not think that course advisable, then apply it to such charitable, educational, and scientific purposes as, in your judgment, will most substantially benefit mankind."³ The trustees procured

¹ 5 Harv. L. Rev. 389; Ames, Lect. Leg. Hist., 285. In the following notes the matter contained within brackets is inserted by the editor; the other matter is by Professor Ames.

² 130 N. Y. 29.

³ The writer is by no means convinced that this was a just interpretation of the will, but for the purposes of this article its accuracy is assumed.

the incorporation of the "Tilden Trust," and elected to convey the entire residue to that institution. An admirable will and willing trustees — and yet the bequest was not sustained. If the trustees had not elected to give the property to the "Tilden Trust," that institution would have had no claim, nor would there have been, under the law of New York, any means of compelling them to apply it to the alternative charitable purposes. Therefore, the Court of Appeals decided, the trustees could not dispose of the property in either of the two modes indicated in the will, and the entire residue, amounting to some \$5,000,000, must be distributed among the heirs and next of kin.

The question of the proper interpretation of the will apart, the failure of the "Tilden Trust" is due to a combination of two causes: the one legislative, the other judicial. Had the Tilden case arisen in England, or in any of our States, except New York, Michigan,¹ Minnesota,² Maryland,³ Virginia,⁴ and West Virginia,⁵ the trust would have been established. The precise nature of the legislation in New York will be best appreciated by contrasting a private trust with a charitable trust.

A trust, being an obligation of one person to deal with a specific *res* for the benefit of another, cannot be enforced unless there is a definite obligee, that is, a *cestui que trust*, who can file

¹ *Methodist Church v. Clark*, 41 Mich. 730. But see *White v. Rice*, 112 Mich. 403. [*Wheelock v. American Tract Society*, 109 Mich. 141. But now see Public Acts, 1907, No. 122, amended Public Acts, 1911, No. 125, 4 How. Stat. secs. 10700, 10701, providing that no gift, grant, bequest or devise to religious, educational, charitable or benevolent uses, or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, . . . shall be invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities. See also *Moore v. O'Leary*, 180 Mich. 261.]

² *Little v. Willford*, 31 Minn. 173; *Atwater v. Russell*, 49 Minn. 57. [Gen. Laws, 1903, c. 132, changing the rule in Minnesota, was held unconstitutional because of insufficiency of the title of the statute. *Watkins v. Bigelow*, 93 Minn. 210.]

³ *Gambell v. Trippe*, 75 Md. 252. [*Trinity M. E. Church v. Baker*, 91 Md. 539. But the rule is otherwise as to transfers *inter vivos*. *Snowden v. Crown Cork, etc. Co.*, 114 Md. 650.]

⁴ *Stonestreet v. Doyle*, 75 Va. 356. [*Gallego's Ex'rs. v. A. G.*, 3 Leigh (Va.) 450; *Fifield v. VanWyck*, 94 Va. 557. The rule in Virginia was changed by statute, Acts, 1914, p. 414, Code, sec. 1420. See 1 Va. L. Rev. (n. s.) 161.]

⁵ *Bible Society v. Pendleton*, 7 W. Va. 79. [*Pack v. Shanklin*, 43 W. Va. 304. But see *Hays v. Harris*, 73 W. Va. 17.]

a bill for its specific performance.¹ Furthermore, as equity follows the law, the rule of perpetuities must apply to trusts as well as to legal estates. By the English and general American law, neither of these doctrines, which are of universal application to private trusts, is extended to charitable trusts. On the one hand, the considerations of public policy, which lie at the foundation of the rule of perpetuities in the case of private property, are obviously inapplicable to property devoted to charity; and, on the other, the specific performance of the charitable trust is abundantly secured through the attorney-general acting in behalf of the State.

In New York, however, the English law of charitable trusts has been abolished by statute, and charitable trusts are thereby put upon the same footing as private trusts, with the single exception that property may be given directly to corporations authorized to receive and hold permanently bequests for specified charitable purposes.² This exceptional New York legislation seems to the writer an unmixed evil. Any one who follows the reported cases, to say nothing of the unreported instances, for the last fifty years, will be startled at the number of testators whose reasonable wishes have been needlessly disappointed, and at the amount of property which has been diverted from the community at large for the benefit of unscrupulous relatives.³

¹ Y. B. 15 Hen. VII. 12a.

² [Even in jurisdictions where charitable trusts fail unless there is a definite beneficiary, a bequest or devise to an existing charitable corporation for any or all of its corporate purposes is valid. *Trinity Church v. Baker*, 91 Md. 539; *Holloway v. Mission Helpers*, 119 Md. 667; *Novak v. Orphans' Home*, 123 Md. 161; *Young Men's Christian Association v. Horn*, 120 Minn. 404; *Wetmore v. Parker*, 52 N. Y. 450; *Bird v. Merkle*, 144 N. Y. 544; *Jordan's Adm'r. v. Richmond Home for Ladies*, 106 Va. 710; *Protestant Society v. Churchman's Reps.*, 80 Va. 718; *Osenton v. Elliott*, 73 W. Va. 519.

A bequest or devise to a charitable corporation to be created within the period allowed by the Rule against Perpetuities is valid. *Inglis v. Sailor's Snug Harbour*, 3 Pet. (U. S.) 99; *Gray v. Orphans' Home*, 128 Md. 592; *Lane v. Eaton*, 69 Minn. 141; *Watkins v. Bigelow*, 93 Minn. 210; *Burrill v. Boardman*, 43 N. Y. 254; *Cruikshank v. Home for the Friendless*, 113 N. Y. 337 (invalid because not to be created within period). See Gray, Rule ag. Perp., secs. 607-628.

But in jurisdictions where charitable trusts fail unless there is a definite beneficiary, a bequest or devise to a corporation for other than its corporate purposes is invalid. *Trinity Church v. Baker*, 91 Md. 539; *Fosdick v. Hempstead*, 125 N. Y. 581.]

³ *Owens v. Missionary Society*, 14 N. Y. 380; *Downing v. Marshall*, 23 N. Y. 366; *Levy v. Levy*, 33 N. Y. 97; *Bascom v. Albertson*, 34 N. Y. 584;

Nor has New York, whose legislation in general has been widely copied, made any recent converts to her doctrine of charities. On the contrary, Wisconsin, which at one time followed the New York rule, by the revision of 1878 adopted the English practice with the exception of the so-called *cy-pres* doctrine. Virginia, too, which at one time ignored the distinction between private and charitable trusts, has, by statute, sanctioned to a limited extent indefinite charitable trusts.¹

RESTRICTIONS ON GIFTS FOR CHARITABLE PURPOSES. "Under the feudal system, when land was given to a corporation, the chief lords of whom the land was held, and the king as ultimate chief lord, lost their chances of escheat, and various other rights and incidents of military tenure. During the middle ages, the accumulation of land in the ecclesiastical corporations was so great as to be thought a national grievance. Hence the English mortmain acts, which go back for their origin to Magna Charta, St. 9 Hen. III. c. 36, and which have continued with various modifications to this day. . . . Under these acts the alienations were not void, so as to let in the grantors and their heirs; but they merely operated as a forfeiture which gave a right to the mesne lord and the king to enter after due inquest. This right to enter was often waived by a license in mortmain. . . . In form these licenses commonly authorized a holding of property "not exceeding" a certain value. In later years this authority

Adams v. Perry, 43 N. Y. 487; White v. Howard, 46 N. Y. 144; Holmes v. Mead, 52 N. Y. 332; Prichard v. Thompson, 95 N. Y. 76; Cottman v. Grace, 112 N. Y. 299; Read v. Williams, 125 N. Y. 560; Fosdick v. Hempstead, 125 N. Y. 581; Tilden v. Green, 130 N. Y. 29. [Fairchild v. Edson, 154 N. Y. 199; Murray v. Miller, 178 N. Y. 316. The rule in New York was changed by a statute (Laws, 1893, c. 701, amended by Law of 1901, c. 291, Real Property Law, sec. 12, Personal Property Law, sec. 113) providing that no gift, grant, bequest or devise to religious, charitable, or benevolent uses . . . shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. By this statute the former law of charitable trusts was restored both as to the definiteness of beneficiaries and as to the rule concerning perpetuities. Allen v. Stevens, 161 N. Y. 122. See also Matter of Robinson, 203 N. Y. 380; Matter of Cunningham, 206 N. Y. 601; *Re MacDowell's Will*, 217 N. Y. 454.]

¹ For a discussion of questions of public policy in regard to charitable trusts, see Hobhouse, *The Dead Hand*; Kenney, *Endowed Charities*. On the English methods of supervising charitable trusts, see Mitcheson, *Charity Commission Acts*; Tudor, *Charities*; Escarra, *Les Fondations en Angleterre*.

sometimes has been inserted in the charter, and this limited power of purchase has, it is said, been exceeded by almost all corporations." *Hubbard v. Worcester Art Museum*, 194 Mass. 280, 283.

In some states there are restrictions on the amount of property which may be held by a charitable corporation. For conflicting decisions as to the effect of a devise or bequest in excess of the statutory amount, see *Hubbard v. Worcester Art Museum*, 194 Mass. 280; *Matter of McGraw*, 111 N. Y. 66. See Warren, *Cas. Corp.*, 2 ed., 699-711.

The Statute of Wills, 32 Hen. VIII. c. 1 (1540), as explained in 34 Hen. VIII. c. 5 (1542), in authorizing devises of land, expressly excepted devises to bodies politic or corporate. It has been held, however, that the Stat. 43 Eliz. c. 4 rendered a devise to a corporation for charitable uses valid in equity. *Flood's Case*, Hob. 136; *Collison's Case*, Hob. 136. See also *Bennet College v. Bishop of London*, 2 Wm. Bl. 1182; *Incorporated Society v. Richards*, 1 Dr. & W. 258, 303. In the present English Wills Act, 7 Will. IV. & 1 Vict. c. 26 (1837), the exception as to bodies politic or corporate was omitted.

In a few states statutes provide that no corporation shall take land by devise unless the corporation is especially authorized to do so by its charter or by statute. See N. Y. Consol. Laws, 1909, Decedent Estate Law, sec. 12. In some states the statutes apply to bequests as well as to devises. Cal. Civ. Code, sec. 1275; Rev. Codes Mont., 1907, sec. 4725; Comp. Laws N. D., 1913, sec. 5644; Comp. Laws S. D., 1913, sec. 1002; Comp. Laws Utah, 1907, sec. 2734.

In the Georgian Statute of Mortmain, 9 Geo. II. c. 36 (1736), the preamble recited that "Whereas gifts or alienations of land, tenements or hereditaments, in mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and against the common utility; nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs;" and for remedy thereof it was provided that no lands or personalty to be laid out in the purchase of lands should be given to any person or corporation in trust for or for the benefit of any charitable uses, except "by deed indented, sealed and delivered in the presence of two or more credible

witnesses twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death) and inrolled in his Majesty's high court of Chancery, within six calendar months next after the execution thereof; . . . and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him. . . ."

The English law as to assurances to corporations and assurances for charitable purposes was consolidated in the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42). A sweeping change in the law was effected by the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73). By this Act land may be given by will to or for the benefit of any charitable use, but it is required that the land be sold within one year from the death of the testator unless the High Court or a Judge thereof or the Charity Commissioners extend the time or sanction the retention of the land when it is required for actual occupation for the purposes of the charity and not as an investment. This Act, however, leaves unchanged the restrictions on the acquisition of land by corporations contained in the Mortmain and Charitable Uses Act, 1888, which restrictions apply to charitable as well as other corporations. See Bristowe, *Mortmain and Charitable Uses*, 1891; Tudor, *Charities*, 8-13, 427-506.

It is provided in some states that no devise or bequest for a charitable purpose shall be good unless the will is executed within a certain time before the death of the testator. Cal. Civ. Code, sec. 1313 (30 days); Park, *Ann. Code Ga.*, 1914, sec. 385 (90 days); Rev. Code Mont., 1907, secs. 4761-4762 (30 days); Ohio Gen. Code, 1910, sec. 10504 (one year if testator leaves issue or adopted child); Purdon's *Dig. Pa.*, 13 ed., p. 5129 (one month, applying also to transfers *inter vivos*). See Stat. 7 & 8 Vict. c. 97, sec. 16 (Ireland). A similar statutory provision in New York has been repealed. N. Y. Laws, 1911, c. 857. These statutes impose limitations on the right of the testator to devise or bequeath, and only his heir or next of kin or widow can take advantage of them. *Trustees of State University v. Folsom*, 56 Oh. St. 701.

In some states there are statutes which limit the amount which can be devised or bequeathed for charitable purposes.

Cal. Civ. Code, sec. 1313 (one-third if testator leaves legal heirs); Park, Ann. Code Ga., 1914, sec. 385 (one-third if testator leaves wife or descendant); Iowa Code, 1897, sec. 3270 (one-fourth if testator leaves spouse, child or parent); Rev. Code Mont., 1907, sec. 4761 (one-third if testator leaves legal heirs); N. Y. Consol. Laws, 1909, Decedent Estate Law, sec. 17 (one-half if testator leaves spouse, child or parent). These statutes impose limitations on the right of the testator to devise or bequeath and not on the right of the devisee or legatee to take. Hence they have no applicability to bequests by a resident of a state which has no such statute to a charitable corporation of a state which has such a statute. *Healy v. Reed*, 153 Mass. 197.

See Boyle, Law of Charities; Bristowe, Mortmain and Charitable Uses Act, 1891; Finlason, History of the Laws of Mortmain; Shelford, Mortmain; Tudor, Charities; Tyssen, Charitable Bequests; Reports of the Select Committee on the Law of Mortmain; 27 L. Quar. Rev. 204.

IN COMMISSIONERS FOR SPECIAL PURPOSES OF INCOME TAX *v.* PEMSEL, [1891] A. C. 531, LORD MACNAGHTEN said (p. 583): "‘Charity’ in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly."

COGGESHALL AND OTHERS, TRUSTEES OF NEW
ROCHELLE *v.* PELTON AND OTHERS.

COURT OF CHANCERY, NEW YORK. 1823.

7 Johns. Ch. 292.

WILLIAM HENDERSON, by his last will, dated January 16, 1812, among other legacies to individuals and for charitable purposes, bequeathed as follows: "I give and bequeath unto the town of New-Rochelle 1200 dollars, for the express purpose of building or erecting a town house in said town, for transacting

town business, which sum I direct my executors to pay unto such persons as said town shall appoint to receive it, at a legal town meeting; they first giving my executors security, that the said sum shall be appropriated immediately, agreeably to the intention of my will; and until such security is given, I direct my executors not to pay the said sum." And he appointed the defendants his executors. At a legal town meeting of the freeholders and inhabitants of New-Rochelle, on the 2d of April, 1816, the plaintiffs were appointed commissioners to build a town house for the town; and, to remove the doubts entertained by the defendants, as to the safety of paying the plaintiffs the legacy, the plaintiffs were empowered to petition the Legislature for an act authorizing them to receive it. On the petition of the plaintiffs, an act was passed, April 11, 1817, authorizing the plaintiffs, naming them as trustees duly elected and appointed by the town of New-Rochelle, to receive from the executors of William Henderson, deceased, such sum or sums of money, as by the last will of the said W. H. is given and bequeathed to the town of N. R. Adequate security was offered to the executors, who, under the advice of counsel, declined paying the legacy to the plaintiffs, except under the direction of this Court. An amicable bill was accordingly filed, and an answer put in, submitting the question to the Court.

THE CHANCELLOR [KENT]. The pecuniary legacy, in this case, to the town of New-Rochelle, for the purpose of erecting a town house for transacting town business, is valid as a charitable bequest. The cases of the Attorney General *v. Clarke*, Amb. 422, and of *Jones v. Williams*, Amb. 651, show that bequests with descriptions and purposes as general as this, have been held good as charities. The object of this legacy, was a general public use, as convenient for the poor and the rich.

The defendants are accordingly directed to pay the legacy to the plaintiffs, who are authorized, by statute, to receive it, provided security is given, as required by the will, to be approved of by a master.

*Decree accordingly.*¹

¹ In the following cases gifts, bequests or devises were upheld as charitable: *Collison's Case*, Hob. 136 (for repair of highways); *Jones v. Williams*, Amb. 651 (to bring spring water to a town); *Howse v. Chapman*, 4 Ves. 542 (for the improvement of a city); *Newland v. A. G.*, 3 Mer. 684 (to pay part of the national debt); *A. G. v. Heelis*, 2 S. & S. 67 (for the benefit of a town); *A. G. v. Lonsdale*, 1 Sim. 105 (for purposes conducing to the good of a certain county and parish); *Mitford v. Reynolds*, 1 Phil. 185 (for public works of a

PEMBER v. INHABITANTS OF KNIGHTON.

BEFORE LORD FINCH. 1639.

Duke 82.

MONEY was given to maintain a preaching minister; this is no charitable use named in the statute, yet by the Lord Keeper and two Judges, it was decreed to be good, and the use a charitable use, within the equity of that statute; and the executor was ordered to pay that money to the charitable use, for maintenance of it.¹

city); *Nightingale v. Goulburn*, 5 Hare 484, 2 Phil. 594 (for the benefit of Great Britain); *A. G. v. Bushby*, 24 Beav. 299 (to discharge a tax); *Mayor v. Tamplin*, 21 W. R. 768 (for the benefit of a town); *Re Lord Stratheden*, [1894] 3 Ch. 265 (for the benefit of a volunteer military corps); *Re Good*, [1905] 2 Ch. 60 (for books and plate for officers' mess of a certain regiment); *Re Pardoe*, [1906] 2 Ch. 184 (to ring a peal of bells on the anniversary of the restoration of the monarchy, to commemorate that event); *Re Donald*, [1909] 2 Ch. 410 (for the benefit of the mess of a regiment); *Re Verrall*, [1916] 1 Ch. 100, 114 (for promoting the permanent preservation of lands of beauty or historic interest); *Hamden v. Rice*, 24 Conn. 350 (for repair of highways and bridges); *New Castle Common v. Megginson*, 1 Boyce (Del.) 361 (trust created by William Penn for the use of the inhabitants of a certain town); *Re Graves' Estate*, 242 Ill. 23 (bequest to Board of Park Commissioners of a city for the erection of a drinking fountain for horses with a monument consisting of a life-sized statue of a horse of the testator); *Richardson v. Essex Institute*, 208 Mass. 311 (devise of a house as a museum); *Burr v. City of Boston*, 208 Mass. 537 (to maintain and improve the parks of a city); *Thorp v. Lund*, 227 Mass. 474 (to such national or philanthropic purpose in Norway associated with the name of Ole Bull as A may direct); *Hosmer v. City of Detroit*, 175 Mich. 267 (to erect a fountain in a public park with a life-sized statue of the testator); *Stewart v. Coshov*, 238 Mo. 662 (to establish a public cemetery); *Cresson's Appeal*, 30 Pa. 437 (for shade trees); *Re Centennial and Memorial Association of Valley Forge*, 235 Pa. 206 (to maintain Valley Forge as a public park). See a collection of cases of trusts for the benefit of the public in Ann. Cas. 1914A 1215.

¹ "A gift of lands, etc., to maintain a chaplain or minister, to celebrate divine service, is neither within the letter nor meaning of this statute; for it was of purpose omitted in the penning of the act, lest the gifts intended to be employed upon purposes grounded upon charity might, in change of times (contrary to the minds of the givers) be confiscate into the King's treasury. For religion being variable, according to the pleasure of succeeding princes, that which at one time is held for orthodox may at another be accounted superstitious, and then such lands are confiscate." Moore, Readings upon the Statute of 43 Elizabeth, Duke 131.

THORNTON *v.* HOWE.

CHANCERY. 1862.

31 Beav. 14.

THE testatrix, Ann Essam, by her will dated in 1843, bequeathed as follows:—

“And as to all the rest, residue and remainder of my estate, both real and personal, whatsoever and wheresoever, that I may be possessed of, after the payment of all my just debts, funeral and testamentary expenses, I give, devise and bequeath the same unto Benjamin Howe, of No. 107, Old Street, St. Luke’s, London, engineer, to hold to him, his heirs and assigns for ever. But it is my express wish and desire, that the produce of all my said real and personal estate, so devised and bequeathed to him and his heirs, shall be applied for and towards the printing, publishing and propagation of the sacred writings of the late Joanna Southcote; and I hereby constitute and appoint the said John Spencer sole executor of this my will.”

The testatrix died in 1844.

The heiress-at-law of the testatrix filed this bill in 1861 against Howe and the Attorney-General, and it charged as follows:—

“The plaintiff charges that the trust for the printing and publishing and propagation of the sacred writings of the late Joanna Southcote is either void in law, on the ground that the writings in question are of a blasphemous and profane character, or that the trust so declared is a trust for the propagation of doctrines subversive or contrary to the Christian religion or as being a trust for a charitable purpose within the act of 9 Geo. 2, c. 36.

“The plaintiff charges that the writings of Joanna Southcote, which are referred to in the will of the testatrix, purport to declare, maintain or reveal that she was with child by the Holy Ghost, and that a second Shiloh or Messiah was about to be born of her body, and in other parts thereof purport to be or contain revelations made to her by the Holy Ghost or by Divine inspiration, and to maintain or declare that she was moved or inspired by the Holy Spirit to write the same, and that in other parts they are of a blasphemous and profane character.”

The bill prayed, amongst other things, a declaration “that the trust declared by the testatrix’s will of her real estate, so far

as it directed that the produce thereof should be applied for and towards the printing, publishing and propagation of the sacred writings of the late Joanna Southcote, was void in law, and that there was a resulting trust of her real estate in favor of her heir-at-law, so far as her real estate was subjected to such void trust."

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY] said he must examine the printed works of the founder of this sect before he gave judgment.

THE MASTER OF THE ROLLS. The question is, whether the following is a good devise of real estate: — "It is my express wish," &c. [see *ante*].

In the first place, it is said that this, if a lawful and legitimate purpose, is a charity and therefore void, so far as the real estate is concerned, by reason of the Statute of Mortmain, and, secondly, it is also said, that this is wholly void, both as to realty and personalty, by reason of the immorality and irreligious tendency of the writings of Joanna Southcote, which, by this disposition of her property, the testatrix intended to circulate and make more extensively known.

On the latter point, being unacquainted with the writings of Joanna Southcote, it became my duty to look into them, for the purpose of satisfying myself on this point, and the result of my investigation is, that there is nothing to be found in them which, in my opinion, is likely to corrupt the morals of her followers, or make her readers irreligious.

She was, in my opinion, a foolish ignorant woman, of an enthusiastic turn of mind, who had long wished to become an instrument in the hands of God to promote some great good on earth. By constantly thinking of this it becomes in her mind an engrossing and immovable idea, till at last she came to believe that her wish was accomplished, and that she had been selected by the Almighty for this purpose. Of course she had, during her life, many followers, and probably has some now, as every person will have who has attained to such a pitch of self-confidence as sincerely to believe himself to be the organ of communication with mankind specially selected for that purpose by the Divine Author of his being.

In the history of her life, her personal disputations and conversations with the devil, her prophecies and her inter-communications with the spiritual world, I have found much that, in my opinion, is very foolish, but nothing which is likely to make

persons who read them either immoral or irreligious. I cannot, therefore, say that this devise of the testatrix is invalid by reason of the tendency of the writings of Joanna Southcote.

On the other hand, the contention raised, that this is a gift to promote objects which are within the meaning of what this Court, for shortness, terms "charitable objects," and that, consequently, it is within the provisions of the Statute of Mortmain, presents a more serious objection to this devise.

The 43 Eliz. c. 4 is usually referred to for the purpose of testing the enumeration of the various subject-matters which are there considered to be charitable uses, and what testamentary dispositions come within the Statute of Mortmain. The preamble of this statute clearly points out an object within which this would fall. I am of opinion, that if a bequest of money be made for the purpose of printing and circulating works of a religious tendency, or for the purpose of extending the knowledge of the Christian religion, that this is a charitable bequest, and this Court will, upon a proper application being made to it, sanction and settle a scheme for this purpose, and, in truth, it is but lately that I have had in Chambers to settle and approve of a scheme of this description. In this respect, I am of opinion that the Court of Chancery makes no distinction between one sort of religion and another. They are equally bequests which are included in the general term of charitable bequests.

Neither does the Court, in this respect, make any distinction between one sect and another. It may be, that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void; but the character of the bequest, so far as regards the Statute of Mortmain, would not be altered by this circumstance. The general immoral tendency of the bequest would make it void, whether it was to be paid out of pure personalty or out of real estate. But if the tendency were not immoral, and although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation, it would not, on that account, declare it void, or take it out of the class of legacies which are included in the general terms charitable bequests.

The words of the bequest here are, "to propagate the sacred writings of Joanna Southcote." The testatrix, it is clear, was a disciple or believer in Joanna Southcote, who, from her writ-

ings, it is clear, was a very sincere Christian; but she laboured under the delusion that she was to be made the medium of the miraculous birth of a child at an advanced period of her life, and that thereby the advancement of the Christian religion on earth would be occasioned. But her works, as far as I have looked at them, contain but little upon this subject, and nothing which could shake the faith of any sincere Christian. In truth, though her works are in a great measure incoherent and confused, they are written obviously with a view to extend the influence of Christianity.

I cannot say that the bequest of a testator to publish and propagate works in support of the Christian religion is a charitable bequest, and, at the same time, say that if another testator should select for this purpose some three or four authors, whose works will, in his opinion, produce that effect, such a bequest thereupon ceases to be charitable.

Neither can I do so if a testator should select one single author whose works he thinks will produce that result. If a testator were to leave a fund for the purpose of propagating, at a very reduced price, the religious writings of Dr. Paley or Dr. Butler, I should be of opinion that the bequest was charitable in its character, and I must hold the same in respect of what the testatrix has called "the sacred writings of the late Joanna Southcote."

Had it been given out of pure personalty, or rather if there had been any pure personalty in this case, this Court would, in my opinion, have enforced the bequest and regulated the application of it as well as it could. But, as it is given out of land, it is void, by reason of the prohibition contained in the Statute of Mortmain (9 Geo. 2, c. 36); and at the proper time, which this is not, as this is only an application from chambers, I will make a declaration to that effect.¹

¹ In *Re Bowman*, [1917] A. C. 406, the House of Lords upheld a bequest upon trust for the Secular Society Ltd., a registered company, the objects of which were *inter alia* "to promote the principle that human conduct should be based upon natural knowledge and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action." The question whether the objects of the society were charitable was not involved and was not passed upon, although Lord Parker was of the opinion that they were not charitable. See *Re Jones*, [1907] S. Aust. L. R. 190; *Kinsey v. Kinsey*, 26 Ont. L. R. 99; *Pringle v. Napanee*, 43 U. C. Q. B. 285; *Zeisweiss v. James*, 63 Pa. 465; *Manners v. Phila. Library Co.*, 93 Pa. 165.

BUTTERWORTH *et al.* v. KEELER *et al.* AND THE
ATTORNEY GENERAL OF THE STATE OF NEW YORK.

COURT OF APPEALS, NEW YORK. 1916.

219 N. Y. 446.

CARDOZO, J. This action is brought to construe the will of Cornelia Storrs, who died in April, 1912. She directed that her residuary estate be divided into two parts. One of these parts she gave to the New York Skin and Cancer Hospital. The other she gave to her executors "George F. Butterworth and Henry J. Storrs, in trust, nevertheless, to be used and devoted by them to the establishment of a school for girls in the town of North Salem, Westchester County, New York." The question is whether this latter gift is a valid charitable trust.

That it is valid if it is charitable, is not disputed. *Matter of MacDowell*, 217 N. Y. 454. The claim is made, however, by some of the next of kin that in truth it is not charitable. We think the claim is without merit. It is established law in this state that a gift for the promotion of education or learning is a gift for charitable uses. *Matter of Robinson*, 203 N. Y. 380; *Starr v. Selleck*, 145 App. Div. 869; 205 N. Y. 545; *Matter of Cunningham*, 206 N. Y. 601; *Rothschild v. Schiff*, 188 N. Y. 327; *People ex rel. N. Y. Inst. for the Blind v. Fitch*, 154 N. Y. 14, 31. The rule is the same in England (43 Eliz. chap. 4; *Whicker v. Hume*, 7 H. L. Cas. 124; *Smith v. Kerr*, [1902] 1 Ch. 774; *Matter of Hawkins*, (1906) 22 T. L. R. 521); in the Supreme Court of the United States (*Russell v. Allen*, 107 U. S. 163, 167, 172; *Perin v. Carey*, 24 How. 465), and in the highest courts of sister states (*Sears v. Chapman*, 158 Mass. 400; *Dexter v. Harvard College*, 176 Mass. 192; *Parks v. Northwestern University*, 218 Ill. 381). Many other cases to the same effect

In *Mormon Church v. U. S.*, 136 U. S. 1, it was held that Congress might constitutionally dissolve a church corporation, which advocated the practice of polygamy as one of its fundamental tenets.

In the following cases trusts were upheld as charitable: *Shore v. Wilson*, 9 Cl. & F. 355 (Unitarianism); *Re Orr*, 40 Ont. L. R. 567 (Christian Science); *Chase v. Dickey*, 212 Mass. 555 (Christian Science); *Glover v. Baker*, 76 N. H. 393 (Christian Science); *Jones v. Watford*, 62 N. J. Eq. 339, 64 N. J. Eq. 785 (Spiritualism); *Vineland T. Co. v. Westendorf*, 86 N. J. Eq. 343. See 31 Harv. L. Rev. 289.

As to the English law of superstitious uses, see *Tudor, Charities*, 4-8, 44-45.

might be cited. There is no conflict of opinion anywhere. The rule, of course, is different where the school or other institution is maintained for the profit of its owners. The purpose must be the promotion, not of private profit, but of public learning. *Matter of MacDowell, supra*. It is not charity to aid a business enterprise. But the fact that fees are charged is not controlling. *Parks v. Northwestern University, supra*; *Matter of MacDowell, supra*, at p. 464. Most of our universities and hospitals would be excluded by such a test, yet universities and hospitals are unquestionably public charities. *Parks v. Northwestern University, supra*; *Schloendorff v. Society of the N. Y. Hospital*, 211 N. Y. 125, 127. What controls is not the receipt of income, but its purpose. Income added to the endowment helps to make it possible for the work to go on. It is only when income may be applied to the profit of the founders that business has a beginning and charity an end. The line of division is the same whether the gift is devoted to education or to the relief of the poor, the halt and the blind. Charity ministers to the mind as well as to the body.

Our decision in *Matter of Shattuck*, 193 N. Y. 446, is said by the appellants to have revolutionized these ancient principles; but it did nothing of the kind. The trust in that case was not to found a new institution of learning. It was to pay the income to existing institutions, either religious or educational or eleemosynary. This left the trustees free to select any educational institution, whether eleemosynary or not. They were, therefore, free to select institutions organized for private profit. The decisive consideration was the contrast which the court discerned in the mind of the testatrix between purposes that were educational and purposes that were eleemosynary. If the trust had been for the advancement of education, and nothing more, a different conclusion might have followed. The *Shattuck* case lays down no principle of large and general application. It defines the meaning of a particular will, and later cases have held that it must be limited to its special facts. *Matter of Robinson, Matter of Cunningham, supra*.

Different altogether is the will before us. No such latitude of choice is given to these trustees. They are not to distribute a fund among existing institutions, whether eleemosynary or not. They are to organize a new school; and unless we can say that they are to organize it for profit, the school will be a charity. But plainly there was no intent that they should

organize it for profit. They are at liberty, if they wish, to make the tuition free, but even though it is not free, the conclusion must be the same. If profit was the purpose, the will would have told us to whom the profits were to go. The trustees are certainly not to use the surplus revenue for themselves. They are not to apply it to the use of other legatees, for the subject of the gift is half of the residuary estate, and no other legatees are named. The testatrix did not intend to die intestate, and establish a trust for the benefit of her next of kin. There is significance also in the gift with which the one in controversy is associated. The other half of the residuary estate is given to a corporation unmistakably charitable, the Skin and Cancer Hospital. It is plain that profit is not contemplated; that revenue not expended is to be added to the endowment; and that the purpose of the gift is charity. Extrinsic evidence is not needed to make this purpose clear. It may, however, reinforce the conclusion to which we should be led without it. The finding is that for many years the testatrix had evinced a charitable interest in the young men and women of the town of North Salem, where she resided, and in the public school facilities of the town, which she knew to be inadequate. The purpose perpetuated in her will is thus revealed as the same purpose cherished during life. It cannot be misread, and ought not to be nullified.

The judgment should be affirmed, with costs payable out of the estate.

WILLARD BARTLETT, Ch. J., COLLIN, CUDDEBACK, HOGAN and POUND, JJ., concur; HISCOCK, J., absent.

*Judgment affirmed.*¹

¹ In the following cases it was held that the mere fact that a moderate fee is to be paid by those who are to enjoy the benefit of the charity is immaterial: *Re Webster*, [1912] 1 Ch. 106 (for nurses to attend the poor); *Parks v. Northwestern University*, 218 Ill. 381 (university); *Thornton v. Franklin Square House*, 200 Mass. 465 (home for working girls); *Little v. City of Newburyport*, 210 Mass. 414 (Y. M. C. A.); *Alfred University v. Hancock*, 69 N. J. Eq. 470 (university); *Schloendorff v. Society of N. Y. Hospital*, 211 N. Y. 125 (hospital); *Re MacDowell's Will*, 217 N. Y. 454 (home for gentlewomen); *Taylor v. Protestant Hosp. Ass'n*, 85 Oh. St. 90; *O'Brien v. Physicians' Hosp. Ass'n*, 96 Oh. St. 1 (hospital); *Re Daly's Estate*, 208 Pa. 58 (home for industrious girls); *Webster v. Wiggin*, 19 R. I. 73 (tenements for laboring classes); *Hospital of St. Vincent v. Thompson*, 116 Va. 101 (hospital); *Maxcy v. City of Oshkosh*, 144 Wis. 238 (manual training school).

But a gift to an educational institution conducted for private profit is not charitable. *Stratton v. Physico-Medical College*, 149 Mass. 505.

SEARS v. ATTORNEY GENERAL.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1907.

193 Mass. 551.

KNOWLTON, C. J. This case was heard before a single justice and reserved for the full court upon the question "Whether the widow and orphans' fund of Trinity Church in the city of Boston is a fund held upon such a charitable trust that it may, on a proper case being made out, be directed by the court to be applied *cy pres*." The facts proved and the scheme proposed at the hearing are not reported, and we have no occasion to consider anything but the question presented by the reservation.

This fund was originally raised by a subscription of persons connected with Trinity Church in 1804, and was stated to be "for the benefit of the widows and orphan children that may be left by the future ministers of this church." Since then it has increased greatly by accumulation. In another part of the subscription paper, after referring to the annuity for the benefit of Mrs. Anne Parker, widow of a deceased bishop and rector of the church who was primarily to receive the income, it was said that after her decease the fund was "to be directed to the benefit of the successive clergymen of said parish," etc. At a meeting of the subscribers held on December 30, 1804, a scheme for the management and use of the fund was voted, providing that the income should be used, first, for the benefit of the widow and minor children of the late Bishop Parker, and then to be paid to the widow or orphan child or children of any rector of the church, and if, by accumulation, the fund should become so large as to yield an annual income of more than \$1,000, new funds should be created from the accumulation as follows: First, one for the widow and minor child or children of the assistant minister of the church, and then one for the support of the dignity of the bishop of Massachusetts when such bishop should be the rector of Trinity Church, and then one for the "use and benefit of the bishop, rector, assistant minister, or to such other object connected with this church, as the wardens and vestry thereof for the time being, may in their judgment deem fit and advisable." Provisions were made as to the amounts that might be expended for each of these objects, in succession, before the application of any money to the creation of the next fund mentioned in order, and other details as to the

management and use were prescribed, which we need not consider. The payments that may be made to widows and minor children were limited to cases in which they had no considerable income from other sources, and these payments were not to exceed \$1,000 per year to the widow and minor children of the rector, and \$800 per year to the widow and minor children of the assistant minister.

By the St. 1830, c. 83, Trinity Church was incorporated, and provision was made in Sec. 4 of the act for the appointment of a trustee or trustees to hold and manage this fund, conformably to the directions given in the vote already referred to.

As a general proposition, a gift made for the support of needy widows and orphans of a particular class is an eleemosynary public charity. This has been established by so many cases, and with such full discussion, that there is no occasion to consider the reasons on which the rule is founded. *Saltonstall v. Sanders*, 11 Allen, 446, 457. *Jackson v. Phillips*, 14 Allen, 539, 551. *Burbank v. Burbank*, 152 Mass. 254, 256. *Minns v. Billings*, 183 Mass. 126, 129. *Attorney General v. Goulding*, 2 Bro. C. C. 428. *Colinson v. Pater*, 2 Russ & Myl. 344. *Bristow v. Bristow*, 5 Beav. 289. *Thompson v. Corby*, 27 Beav. 649. *Thompson v. Thompson*, 1 Coll. C. C. 381, 392.

The gift in the present case is primarily to persons of a class, and not to designated individuals. The members of this class, for all time, are to take. The class, considered strictly, is very small, and the only question is whether the object is so general and indefinite as to be deemed of common and public benefit, and so a public charity. It includes the families of deceased clergymen of the Protestant Episcopal Church, and the selection of them is limited to those in which the husband or father was a rector or assistant minister of Trinity Church. In the course of many years the number benefited might be large, and while the number ultimately receiving a direct benefit is limited to those connected with this religious society, the larger class of clergymen of the same religious faith are indirectly helped by the chance that they may be chosen to one of these places and their families receive assistance from this fund. In *Attorney General v. Old South Society*, 13 Allen, 474, 475, 476, 492, it appears that a fund was established "for the support of the widows and fatherless children of ministers of the church," and although it is not expressly stated that this was a public charity, the decision of the case seems to have been upon that assumption.

In *Kent v. Dunham*, 142 Mass. 216, a devise to trustees, expressed to be "for the aid and support of those of my children and their descendants who may be destitute, and in the opinion of said trustees need such aid," was held to be not a public charity, and void. We infer, although the statement in the opinion is not in these terms, that one reason of the decision is that the class was not sufficiently large and indefinite to make the gift of common and public benefit.

We think that there are strong reasons for holding that the fund, in the present case is a public charity, viewed solely in its eleemosynary aspect; but we do not decide this, for we think the plaintiff's other contention, that it is good as a religious charity, should be sustained.

When the different provisions of the vote of the subscribers are considered, it becomes plain that their principal object was religious. They were providing for the encouragement and support of the rector by establishing a fund which would ensure the proper maintenance of his wife and minor children if he died and left them without property. This should be regarded as a gift for the support of the rector. *Anon.* 2 Vent. 349. *Attorney General v. Cock*, 2 Ves. Sr. 273. *Doe v. Aldridge*, 4 T. R. 264. *Attorney General v. Lawes*, 8 Hare, 32. After making provision for the families of the rector and the assistant minister, the fund, if large enough, was to be used for the bishop of Massachusetts when a rector of that church, and then, if its accumulations became sufficient, it was to be applied to the use and benefit of the bishop, rector, assistant minister, or to other objects connected with the church, in the discretion of the wardens and vestry. In general terms, the money was to be devoted to religious uses in connection with this church.

Is a gift of money for such a use a public charity? There have been decisions and dicta in this Commonwealth, which, if they embodied the whole law on the subject would require an answer in the negative. But these are few. They were induced by peculiar conditions, and they are at variance with the general course of decision elsewhere and with the later decisions of this court. . . .

We are of opinion that the question reserved must be answered in the affirmative.

*Decree for the plaintiff.*¹

¹ In the following cases the persons to be benefited were not so definite as to prevent the trust from being charitable: *Bristow v. Bristow*, 5 Beav.

289 (poor on a particular estate); *Thompson v. Thompson*, 1 Coll. 381 (unsuccessful literary men); *Re Gosling*, 48 W. R. 300 (pensions for old and wornout clerks of a particular firm); *Hayes v. Pratt*, 147 U. S. 557 (home for disabled or aged and infirm and deserving American mechanics); *Union Pacific Ry. Co. v. Artist*, 60 Fed. 365 (hospital for employees of railroad); *Beardsley v. Bridgeport*, 53 Conn. 489 (worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans residing in the town of A); *Illinois Central R. R. Co. v. Buchanan*, 31 Ky. L. Rep. 722 (hospital for employees of railroad); *Louisville & Nashville R. R. Co. v. Foard*, 104 Ky. 456 (like last case); *Holmes v. Coates*, 159 Mass. 226 (disabled soldiers and sailors who served in the Union Army in the Civil War); *Minns v. Billings*, 183 Mass. 126 (disabled members of an association of printers, or teachers and of bank officers); *A. G. v. Bedard*, 218 Mass. 378 (necessitous operatives engaged in a particular strike); *Carter v. Whitcomb*, 74 N. H. 482 (needy members of the Grand Army of the Republic in the vicinity of the town of A); *Wilkinson's Ex'rs. v. Trustees*, 38 N. J. Eq. 514, aff'g 36 N. J. Eq. 141 (poor members of two designated churches); *Keith v. Scales*, 124 N. C. 497 (poor members of a particular school); *Witman v. Lex*, 17 S. & R. (Pa.) 88 (to church for bread for poor of congregation); *Richtman v. Watson*, 150 Wis. 385 (needy members of a particular church).

A gift to a fraternal or other organization for its general purposes is not charitable where such purposes are not charitable. *Re Clark's Trust*, 1 Ch. D. 497 (friendly society); *Cunnack v. Edwards*, [1896] 2 Ch. 679 (friendly society); *Braithwaite v. A. G.*, [1909] 1 Ch. 510 (friendly society); *Kauffman v. Foster*, 2 Cal. App. 778 (Masons); *Bangor v. Masonic Lodge*, 73 Me. 428 (Masons); *Swift's Ex'rs. v. Easton Beneficial Society*, 73 Pa. 362; *Mason v. Perry*, 22 R. I. 475 (Masons). But see the following cases in which the gift was held to be charitable: *Mayor v. Solomon Lodge*, 53 Ga. 93 (Masons; statutory); *Grand Lodge v. Board of Review*, 281 Ill. 480 (Masons); *Cruse v. Axtell*, 50 Ind. 49 (Masons); *Brown v. Webb*, 60 Ore. 526 (Independent Order of Good Templars); *Moseley v. Smiley*, 171 Ala. 593 (Tabernacle Alliance).

In the following cases it was held that although the beneficiaries were limited to members or relatives of members of a fraternal or other organization, yet since the benefits were conditioned upon poverty, the trust was charitable: *Pease v. Pattinson*, 32 Ch. D. 154 (Miners' Permanent Relief Fund Friendly Society); *Spiller v. Maude*, 32 Ch. D. 158n. (Royal General Theatrical Fund Association, to provide for indigent members); *Re Buck*, [1896] 2 Ch. 727 (Commercial Travellers' Society for the relief of sick and distressed members, their widows and orphans); *Re Lacy*, [1899] 2 Ch. 149 (Royal General Theatrical Fund Association); *Estate of Willey*, 128 Cal. 1 (bequest to certain Masonic Lodges for the use of their widows' and orphans' funds); *Guilfoil v. Arthur*, 158 Ill. 600 (bequest on trust for widows and orphans of deceased members of brotherhood of Locomotive Engineers); *Widows' and Orphans' Home v. Comm.*, 126 Ky. 386 (Widows' and Orphans' Home of the Odd Fellows of Kentucky); *Green's Admrs. v. Fidelity T. Co.*, 134 Ky. 311 (bequest to erect and maintain an institution for the support and education of poor orphans of Free Masons of Indiana); *Masonic etc. Trust v. Boston*, 201 Mass. 320 (bequest to establish and maintain home for needy Masons in Boston and vicinity); *Heiskell v. Chickasaw Lodge*, 87

Tenn. 668 (for widows and orphans of deceased members of lodge of Odd Fellows); *City of Petersburg v. Petersburg Ben. Mech. Assoc.*, 78 Va. 431 (Benevolent Mechanics Association). But see *contra*, *Troutman v. DeBoisiere etc. Ass'n*, 66 Kan. 1 (trust to provide a home for the orphan children of deceased Odd Fellows of Kansas). In *Phila. v. Masonic Home*, 160 Pa. 572, it was held that home for destitute widows and orphans of Free Masons of Pennsylvania, and for sick indigent Free Masons, was not exempt from taxation as a "purely public charity."

In the following cases the trusts were held charitable: *Flood's Case*, Hob. 136, Duke 85 (to college to find a scholar of testator's poor relations); *Spencer v. All Souls College*, Wilms. 163 (for establishing fellowship of a college, preference to be given to testator's poor relations); *White v. White*, 7 Ves. 422 (perpetual fund to apprentice testator's poor relations); *A. G. v. Price*, 17 Ves. 371 (annual distribution among testator's poor kinsmen); *A. G. v. Sidney Sussex College*, 34 Beav. 654, L. R. 4 Ch. 722 (to a college for the education of descendants of testator's brothers and sisters); *Gillam v. Taylor*, L. R. 16 Eq. 581 (permanent fund for needy descendants of testator's uncle); *A. G. v. Duke of Northumberland*, 7 Ch. D. 745 (perpetual fund for poor kindred of testator; fund not being exhausted, scheme framed for other poor); *Re Lavelle*, [1914] 1 I. R. 194 (perpetual fund to educate testator's relatives); *Perin v. Carey*, 24 How. (U. S.) 465 (for founding college, preference to be given in applications for admission to relatives and descendants of testator and of other designated persons); *Darcy v. Kelley*, 153 Mass. 433 (perpetual fund for the poor, preference to be given to testator's poor relatives); *Dexter v. Harvard College*, 176 Mass. 192 (to a college for the education of lineal descendants of testator's grandparents, any excess to be expended for general purposes of the college); *Gafney v. Kenison*, 64 N. H. 354 (income to be applied for ten years for relief of most destitute of testator's relatives within certain degrees); *Re MacDowell's Will*, 217 N. Y. 454 (for home for poor gentlewomen, preference to be given to descendants of testatrix, and of other designated persons).

In the following cases, however, it was held that the trusts were not charitable: *Johnson v. DePauw University*, 116 Ky. 671 (for educating the descendants of two persons named); *Kent v. Dunham*, 142 Mass. 216 (for the aid and support of destitute descendants); *Re MacDowell's Will*, 217 N. Y. 454 (home for benefit of poor relatives and descendants of designated persons, *semble*).

In the following cases a bequest for the benefit of poor relatives of the testator was held to apply only to those who would take under the Statute of Distributions: *Carr v. Bedford*, 2 Rep. Ch. 77; *Griffith v. Jones*, 2 Rep. Ch. 179; *Edge v. Salisbury*, Amb. 70; *Gower v. Mainwaring*, 2 Ves. Sr. 87, 110; *Isaac v. Defriez*, Amb. 595, 17 Ves. 373n.; *Brunsdon v. Woolledge*, Amb. 507; *Widmore v. Woodroffe*, Amb. 636; *Bronson v. Strouse*, 57 Conn. 147. See *Webster v. Morris*, 66 Wis. 366, 392. In several of these cases it was said that the gift was charitable, but this view must be unsound.

In *Re Gassiot*, 70 L. J. Ch. 242 (1901), it was held that a trust "for the benefit of individuals who have been engaged in the Oporto Red or Port St. Mary's White Sherry Wine Trade," was not charitable.

In *Re Drummond*, [1914] 2 Ch. 90, it was held that a bequest for the purpose of contribution to the holiday expenses of the employees of a certain

company, where the employees were all paid as much as 15s. a week, was not charitable. See also *Re Cullimore*, L. R. Ir. 27 Eq. 18.

In *Lavery v. Lavery*, [1907] 1 I. R. 9, it was held that a bequest to contribute toward the support and education of any Roman Catholic boys of the surname of Lavery was not charitable.

In *Re Zeagman*, 37 Ont. 536, a bequest to a church for the saying of masses for the soul of the testator and of his descendants forever was held not charitable, and though held valid as to the soul of the testator, it was held invalid as to those of his descendants.

See Gray, Rule ag. Perp., App. A, "Charities for Definite Persons"; Halsbury, Laws of England, tit. Charities, 109.

DA COSTA v. DE PAS.

CHANCERY. 1754.

1 Amb. 228.

ELIAS DE PAS, a Jew, by will, dated the 4th of November, 1739, established a fund of 1200*l.* to be appropriated in order to apply and dedicate the revenue of that sum towards establishing a Jesuba, or assembly for reading the law, and instructing people in our holy religion.

Qu. To whom the said sum should belong? whether the next of kin, or as a charity for the crown to dispose of?

A distinction was taken by LORD HARDWICKE, Chancellor, that when the devise is to a superstitious use, and made void by statute, or to a charity, and made void by statute of mortmain, there it should belong to the heir at law or next of kin; but where it is in itself a charity, but the mode in which it is to be disposed, is such that by the law of England it cannot take effect, as in the present case, it promoting a religion contrary to the established one; there the crown, by sign manual directed to the Attorney-General, may give orders in what charitable manner it shall be disposed.¹

NOTE. — I was afterwards informed that 1000*l.* of the money was directed by sign manual to be disposed of to the Foundling Hospital.²

¹ See the comments of Lord Eldon in *Moggridge v. Thackwell*, 7 Ves. 36, 76. And see *Cary v. Abbott*, 7 Ves. 940; *West v. Shuttleworth*, 2 Myl. & K. 684; *Sims v. Quineau*, L. R. 16 Ir. 191.

² Reporter's Note: It appears by the following note from the Register's Book that 1000*l.* of the 1200*l.* was afterwards applied to the support of a preacher etc. of a charitable institution for the support of exposed and deserted children. Lib. Reg. 1753. A. fo. 309. "Upon opening of the measure this

IN ATTORNEY GENERAL v. DOWNING, Wilm. 1 (1767), WILMOT, C. J., said (p. 32): "But where property is given to mistaken charitable uses, this Court distinguishes between the charity and the use; and seeing a charitable bequest in the intention of the testator, they execute the intention, varying the use, as the King, who is the Curator of all charities, and the constitutional Trustee for the performance of them, pleases to direct and appoint.

"If it were *res integra*, much might be said for the heir at law; because in every other case, if the testator's intention in specie cannot take place, the heir at law takes the estate. And as the motive inducing the disinheritance in a charitable devise, is a passion for that particular charity which he has named, if that particular charity cannot take place, *cessante causâ, cessaret effectus*.

"The right of the heir at law seems to arise as naturally in this case as in any other. But instead of favoring him as in all other cases, the testator is made to disinherit him for a charity he never thought of, perhaps for a charity repugnant to the testator's intention, and which directly opposes and encounters the charity he meant to establish. But this doctrine is now so fully settled that it cannot be departed from; and the reason

present day unto the Right Hon. the Lord Chancellor, etc. by Mr. Ord, of counsel for the Governor, etc. of the Hospital, etc. for exposed and deserted children, it was alleged that the said Elias Paz, being of the Jewish religion, by his will, ordered a fund of 1200*l.* to be appropriated and to apply the revenue thereof for establishing a Jesiba or assembly for daily reading their holy law for ever, that in hearing of this cause the court declared that such bequest was not good in law, and ought not to be decreed or established by the court, but reserved the consideration whether such 1200*l.* ought to accrue to the residue of the personal estate, or to be applied otherwise, and now, etc. that by an order of the 18th of May last upon the special reservation in the said decree concerning the said 1200*l.* legacy, the court declared that the same ought not to accrue to the residue of the personal estate of the said testator, but ought to be applied to some other charitable use, and that the appointment thereof belonged to the crown, and recommended it to the Attorney-General to apply to the king for a sign manual to dispose of the same, that his Majesty, by his sign manual of the 10th July last, was graciously pleased upon the humble petition of the Governor, etc. of the said Hospital, to give etc. 1000*l.* part of the said sum of 1200*l.* towards supporting a preacher, and to instruct the children under their care in the Christian religion, and for other incidental expences attending the said chapel, etc. etc. It was with the consent of the Attorney-General on behalf of the crown, ordered that the said sum of 1000*l.* should be paid to the treasurer of the Hospital to be applied to the uses and purposes aforesaid."

upon which it is founded seems to be this: The donation was considered as proceeding from a general principle of piety in the testator. Charity was an expiation of sin and to be rewarded in another state; and therefore, if political reasons negatived the particular charity given, this Court thought the merits of the charity ought not to be lost to the testator nor to the public, and that they were carrying on his general pious intention; and they proceeded upon a presumption that the principle which produced one charity would have been equally active in producing another, in case the testator had been told that the particular charity he meditated could not take place. The court thought one kind of charity would embalm his memory as well as another and being equally meritorious would entitle him to the same reward."

ATTORNEY GENERAL *v.* SYDERFEN.

CHANCERY. 1683.

1 Vern. 224.¹

MR. SYDERFEN, the defendant's brother, having by his will (amongst other things) charged a manor in the west of England with the raising 1,000*l.* out of the profits, to be applied to such charitable uses as he had by writing under his hand formerly directed, and no such writing being to be found; and the defendant his brother and heir at law being in possession of the estate; the bill was brought in the name of the Attorney-General at the relation of the Governors of Christ's Hospital, setting forth the will, and that no such writing as was mentioned therein was now to be found, and that therefore the application of this charity was in the King, and charging that the testator in his lifetime had frequently expressed his good intentions towards this hospital; and that the King being informed that there was no such writing to be found as aforesaid, had been graciously pleased to declare his will and pleasure to be, that this money should be laid out for the benefit of the mathematical boys, which were of his own foundation in Christ's Hospital; and it was therefore prayed, that the same might be so applied.

The defendant by answer confessed the will, but that the writing therein referred unto was not to be found; and that he believed if any such writing was at any time made by the

¹ See 7 Ves. 43*n.*

testator, it was afterwards by him revoked and cancelled; for that subsequent to the making of this will, he had charged several great sums of money upon his land, and that the whole estate would scarce amount to answer all the charges thereon, and the heir would be disinherited and left without any provision.

LORD KEEPER [GUILFORD]. It is no question but the charity being now general and indefinite (this writing not being to be found) the application of this money is now in the King; and his Majesty having declared his pleasure to have it disposed for the benefit of the mathematical boys of his foundation in Christ's Hospital, he thought it could not be better laid out: and though by the will it was directed to be raised out of the profits, yet it being a gross sum, he thought it would carry interest to the time it should be paid, and raised out of the profits: and forasmuch as by the will it was intended to be a permanent charity, he referred it to a master, who by the approbation of Mr. Attorney General should see it laid out in land for the benefit of the said mathematical boys, and decreed the same accordingly. And cited the case of *Frier v. Peacock* in this court; where Frier the testator had given several particular charities by his will, and devised the surplus for the good of poor people for ever; and a bill being brought, that the surplus which was devised indefinitely might be applied for the benefit of Christ's Hospital by the King's direction, it was so decreed; although there were poor kindred of the testator's who insisted they were within the equity of that general devise to a charity.¹

NOTE. — In this case the defendant by the decree was to be indemnified against the writing referred unto in the bill, in case it should be afterwards found.

ANONYMOUS.

CHANCERY. 1702.

Freem. C. C. 261.

IT WAS said, and not denied, that if a man deviseth a sum of money to such charitable uses, as he shall direct by a codicil to be annexed to his will, or by a note in writing; and afterwards

¹ See *Mills v. Farmer*, 1 Mer. 55, 19 Ves. 482; *Re White*, [1893] 2 Ch. 41; *Re Pyne*, [1903] 1 Ch. 83.

leaves no direction, neither by note nor codicil, the Court of Chancery hath power to dispose of it to such charitable uses as the court shall think fit: and so it was held in the case of Mr. Sidrofen's will, 1 Vern. 224, and the case of one Jones; but if the will points at any particular charity, as for maintenance of a schoolmaster or poor widows, then the Court of Chancery ought not to direct it to any other purpose but such as is pointed at by the will; as if the devise should be for such school as he should appoint, and appoints none, the court may apply it for what school they please, but for no other purpose than a school, although it may be for what school the court thinks fit.

MINOT *v.* BAKER.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1888.

147 Mass. 348.

HOLMES, J. This is a bill for instructions, brought by the administrator *de bonis non*, with the will annexed, of Captain John Percival. The will appointed John P. Healy executor, and gave the residue to Healy, "to be disposed of by him for such charitable purposes as he shall think proper." Healy died, having disposed of only a small portion of the residuary estate in his hands for charitable purposes. The first question raised by the report is, "Whether the sum of \$14,503.75, received by the plaintiff from the suit upon the bond of Healy, as executor of Percival's estate, and from the suit against Healy's administrator, should be paid to the next of kin of John Percival, by reason of the failure of said Healy to dispose of the fund in his lifetime for the purposes specified in the residuary clause of the will of said Percival, or should be applied to charitable purposes, according to a scheme under the direction of the court."

It is settled that the gift to Healy was a good charitable trust. *White v. Ditson*, 140 Mass. 351, 353. *Schouler, petitioner*, 134 Mass. 426. *Saltonstall v. Sanders*, 11 Allen, 446, 453. *Wells v. Doane*, 3 Gray, 201. *Everett v. Carr*, 59 Maine, 325. *Pocock v. Attorney General*, 3 Ch. D. 342. *Chapman v. Brown*, 6 Ves. 404, 410. *Dundee v. Morris*, 3 Macq. 134, 158. There was no resulting trust on account of the vagueness of the objects, as there is in cases where the objects are not confined to charities. *Nichols v. Allen*, 130 Mass. 211. The first point to be determined, therefore, as a matter of construction, whether the

limitation to charities was conditional upon Healy's making an appointment, or whether it should be construed as a gift to charitable uses out and out, with a superadded power to Healy to specify them if he saw fit. And on this part of the question we are of opinion that the gift is an unconditional gift to charitable purposes.

There can be little doubt that such would be the construction adopted by the English courts. *Attorney General v. Fletcher*, 5 L. J. Ch. 75, 78. *Pocock v. Attorney General*, *ubi supra*. *Moggridge v. Thackwell*, 7 Ves. 36; s. c. 13 Ves. 416. *Mills v. Farmer*, 1 Meriv. 55, 100. *White v. White*, 1 Bro. C. C. 12. *Baylis v. Attorney General*, 2 Atk. 239. *Attorney General v. Hickman*, 2 Eq. Cas. Abr. 193. *Doyley v. Attorney General*, 2 Eq. Cas. Abr. 194. *Anon.*, Freem. 262 b. *Copinger v. Crehane*, Ir. Rep. 11 Eq. 429. Although a different opinion has been intimated in some American cases, at least, where there is a naked power not coupled with a trust. *Fontain v. Ravenel*, 17 How. 369, 388, 399 (explained and limited by *Russell v. Allen*, 107 U. S. 163, 169). The question must be kept distinct from other questions which do not bear upon the meaning of the words, such as whether a trust for charity generally is valid, or whether a court of equity can and will exercise so general a discretion as is necessary to carry out the trust, etc. If the meaning of the words alone is considered, it appears to be tolerably plain that the English construction is right. The nature of the gift shows that an application of the funds to charity is the dominant object, and that the selection by the trustee is subordinate, or means to an end. It is not like a gift to a particular charity which fails; there the specific object of bounty or end of the trust may well have furnished the main motive of the testator for giving to charity at all. But to give a power of selection to a party who takes no interest in the fund cannot be supposed to be the main motive of such a trust as we are considering, and the motive of charity goes no further than charity generally, because the testator leaves the rest to his trustee. The testator in such a case says, in effect, I give the fund in trust for charitable purposes, and, to save application to the court, I authorize the trustee to determine the scheme.

In the ordinary case of trusts for such persons of a class as the trustee shall select, when a duty to select is imposed upon the trustee by implication, a general intention to benefit the class is recognized, and the trust will not fail if the trustee

accepts it and then fails to make a selection. *Brown v. Higgs*, 4 Ves. 708; s. c. 5 Ves. 495, and 8 Ves. 561. *Burrough v. Philcox*, 5 Myl. & Cr. 72. *Penny v. Turner*, 2 Phillips, 493. *Harding v. Glyn*, 1 Atk. 469. *Mahon v. Savage*, 1 Sch. & Lef. 111. *Spring v. Biles*, 1 Sch. & Lef. 113, note; s. c. 1 T. R. 435, note. *Salisbury v. Denton*, 3 Kay & Johns. 529. *Nichols v. Allen*, 130 Mass. 211, 219. *Drew v. Wakefield*, 54 Maine, 291.

Here there is a trust, not a mere power, and it was recognized in *White v. Ditson*, *ubi supra*, that a duty was imposed upon Healy to act, which is a strong circumstance in favor of the construction that the benefit is not intended to be made dependent upon his acting. *Brown v. Higgs*, 8 Ves. 561, 571, 574. *Cole v. Wade*, 16 Ves. 27. *Moggridge v. Thackwell*, 7 Ves. 36, 82. And it being settled that in some cases you can separate the general intent from the mode of execution, the nature of the gift in the particulars to which we have adverted already seems to us to make the case a stronger one for doing so than where the selection is to be made from relations or the like, as in the decisions cited. At all events, this case is nearer to those than to a gift to such persons as A. may appoint. *Mills v. Farmer*, *ubi supra*. For there the limitation is as wide as the world, and if A. does not take the beneficial interest it is impossible to suppose that a gift is intended unless he exercises the power confided to him. But charitable purposes constitute a well-defined class, to which it is entirely conceivable that a testator should make a gift. We shall consider the validity of such a gift in a moment.

The construction of the will being what we have declared, the question arises whether a trust originally valid is to fail for want of a trustee, contrary to the general doctrine of equity. There is no doubt that, if there were a very slight indication of the direction which the testator meant his bounty to take, a court of equity would find itself able to carry out the will. In *Schouler*, petitioner, *ubi supra*, the gift was for "charitable purposes, masses, etc.," and the court appointed a new trustee. See also *Copinger v. Crehane*, Ir. Rep. 11 Eq. 429. But it is argued that when the gift originally is, or through the failure of the first trustee to exercise his discretion afterwards becomes, a gift to charitable uses *simpliciter*, then the disposition of the fund in England was in the king as *parens patriæ*, by the sign manual, and that a court of equity as such has no jurisdiction.

It is to be observed, that the objections to the exercise of the

power to frame a scheme in the case supposed are not at all similar to those which apply to a diversion by the sign manual to wholly different uses of property devoted to a specific purpose which fails, because contrary to the policy of the law for instance, as in the well-known case of *Da Costa v. De Pas*, 1 Ambler, 228, s. c. 2 Swanst. 487, note, where a legacy to establish a Jesuba, or assembly for reading the law and instructing people in the Jewish religion, was devoted to the Foundling Hospital for the instruction of the children in the Christian religion. In such a case there is no pretence, or only a pretence, of carrying out the directions of the testator. His will is arbitrarily over-ridden. *Moggridge v. Thackwell*, 7 Ves. 36, 81. But in a case like the present, whether the machinery used is the sign manual or a scheme prepared under the direction of the court, the testator's wishes are carried out as he has expressed them, just as they might be by the appointment of a trustee, or by the framing of a scheme in those cases where the jurisdiction of the court is admitted.

The only objection on the ground of policy to the court's entertaining jurisdiction which has occurred to us is, that it must choose from too wide a field when there is nothing more specific to guide it than a general direction to apply the fund to charitable purposes. If the objection in this general form were sound, a trust for charitable purposes generally ought to have been held void, whereas all the English cases imply, and express decisions establish, that it is valid. *Nichols v. Allen*, 130 Mass. 211, 221. *Moggridge v. Thackwell*, 7 Ves. 36, 80. *Paice v. Archbishop of Canterbury*, 14 Ves. 364. *Legge v. Asgill*, Turn. & Russ. 265, note. *Dolan v. Macdermot*, L. R. 3 Ch. 676. *Pocock v. Attorney General*, 3 Ch. D. 342. *Anon.*, Freem. Ch. 261, case 330 b. It has been said that "the court never, in trusts or powers, exercises a discretion." *Felan v. Russell*, 4 Ir. Eq. 701, 704. But the court has never hesitated to frame a scheme, or to make a choice of the individual beneficiary, when the species of charity was indicated. *Baylis v. Attorney General*, 2 Atk. 239. *White v. White*, 1 Bro. C. C. 12. *Mills v. Farmer*, 1 Meriv. 55; s. c. 19 Ves. 483. *Attorney General v. Gladstone*, 13 Sim. 7. *Gillan v. Gillan*, 1 L. R. Ir. 114. And, as is pointed out by Mr. Justice Gray, in *Jackson v. Phillips*, 14 Allen, 539, 580, a charity being a trust in which the public is interested, and which is allowed by the law to be perpetual, "deserves and often requires the exercise of a larger discernment by the court of

chancery than a mere private trust; for without a large discretionary power, in carrying out the general intent of the donor, to vary the details of administration, and even the mode of application, many charities would fail by change of circumstances," etc. Bearing these considerations in mind, and also that under the English practice there would have been no difference in the execution of the trust, whether by the court or by the sign manual (*Moggridge v. Thackwell*, 7 Ves. 36, 87), we think that the court would find no insuperable difficulty in selecting the species, as well as the particular object, of the charity.

If this be so, the objections remaining to the jurisdiction are purely historical; that it was not exercised in England, and therefore cannot be exercised here; that although in England there was a remedy existing alongside of the ordinary jurisdiction of the chancellor, and practically reaching similar results, yet, since this court has not the powers exercised by the sign manual, a will must be defeated, and a trust must fail which this court but for tradition is perfectly competent to carry into effect by machinery which it would have no hesitation in using were the case a hair's breadth different.

If it is possible to avoid such a result, it is desirable to do so, and the historical tradition must be very clear, and the limit of jurisdiction very well defined, to make it necessary that this court should decline for such arbitrary reasons to enforce a trust which it recognizes as valid. It might be hard to escape from the authorities, if no trust were interposed. *Jackson v. Phillips*, 14 Allen, 539, 576. And it is not to be denied that some courts of authority would probably require a specification of the charity, whether there was a trust or not. *Bristol v. Bristol*, 53 Conn. 242, 256. *Felan v. Russell*, 4 Ir. Eq. 701; s. c. Longf. & Towns. 674. *Clifford v. Francis*, Freeman, 330. *O'Leary*, Religious and Charitable Uses, 183. On the other hand, in *Moggridge v. Thackwell*, 7 Ves. 36, although there were some words of recommendation in the will, not amounting, however, to a limitation of the generality of the trust (7 Ves. 85, 86), and although the circumstance that some objects were pointed out was adverted to in the discussion, Lord Eldon did sanction the opinion, that, if there is or ever has been a trustee, that is enough to warrant the court in framing a scheme, irrespective of the question whether the testator has pointed out any species of charity or not.

In that case, Lord Eldon said that he doubted whether, if the decree upon the principles attaching to charitable uses must have called upon the trustees, it could be said that, because the trustee is dead, the court is not to make a decree ordering such direction, for no such order could be given to the king executing by sign manual. And again in *Paice v. Archbishop of Canterbury*, 14 Ves. 364, 372, he laid it down generally, that, when the bequest is to trustees for charitable purposes, the disposition must be the subject of a scheme before the master; but that, when the object is charity without a trust interposed, it must be by sign manual. See *Down v. Worrall*, 1 Myl. & K. 561, 563; *Reeve v. Attorney General*, 3 Hare, 191, 197; *Cook v. Duckenfield*, 2 Atk. 562, 567, decree stated; *Moggridge v. Thackwell*, 7 Ves. 36, 83, 84; *Boyle, Charities*, 239. In the Anonymous case, *Freem. Ch.* 261, "it was said, and not denied, that if a man deviseth a sum of money to such charitable uses, as he shall direct by a codicil to be annexed to his will, or by a note in writing; and afterwards leaves no direction, neither by note nor codicil, the Court of Chancery hath power to dispose of it to such charitable uses as the Court shall think fit." *Mills v. Farmer*, 1 Meriv. 55, 59, 95.¹

We do not propose to inquire very curiously whether Lord Eldon's view in the latter case before him is historically accurate or not. It is a view which certainly goes no further than some of the earliest cases, and which it is necessary to adopt in this country to prevent a failure of justice. If we acted with less sanction, we should be conforming to the substantive principles of equity by framing an equitable remedy where we recognized an equitable right. We are of opinion that the above mentioned sum of \$14,503.75 should be applied to charitable purposes according to a scheme under the direction of the court. . . .

*Decree accordingly.*²

¹ See *Re Pyne*, [1903] 1 Ch. 83 (to trustees for charitable purposes to be set forth in a codicil; no codicil executed; held, disposition should be under a scheme and not by sign manual).

² In the following cases the trust was not allowed to fail although no trustee was named or the trustee named declined to act, or resigned, or died, or failed or ceased to serve for some other reason: *A. G. v. Hickman*, W. Kel. 34, 2 Eq. Ab. 193 (for encouraging Nonconforming ministers and Dissenting ministers); *A. G. v. Downing*, Amb. 549, 571, Wilm. 1, 21 (for erecting a college); *White v. White*, 1 Br. C. C. 12 (to such lying-in hospital as T appoints); *Mayor of Reading v. Lane*, Duke 81 (to the poor people maintained in the hospital of A forever); *A. G. v. Clarke*, Amb. 422 (to the poor in-

habitants of A); *John v. Smith*, 102 Fed. 218 (for free public schools in A); *Fay v. Howe*, 136 Cal. 599 (for the aid of deserving aged native poor of A); *Appeal of Eliot*, 74 Conn. 586 (for aiding destitute seamen frequenting port of A); *Thompson v. Hale*, 123 Ga. 305 (for a school); *Heuser v. Harris*, 42 Ill. 425, 436 (to poor of A county); *Hunt v. Fowler*, 121 Ill. 269 (to distribute among the worthy poor of A as the Court of Chancery may direct); *Grand Prairie Seminary v. Morgan*, 171 Ill. 444 (for the education of poor young boys of Illinois); *Hitchcock v. Board of Home Missions*, 259 Ill. 288 (for Presbyterian home and foreign missions and for educating poor children); *Dykeman v. Jenkins*, 179 Ind. 549 (for a hospital); *Grant v. Saunders*, 121 Iowa 80 (for the benefit of the poor, *semble*); *Klumpert v. Vrieland*, 142 Iowa 434 (to the poor of A); *Howard's Ex. v. American Peace Society*, 49 Me. 288 (to the suffering poor of A); *Webber Hospital Association v. McKenzie*, 104 Me. 320 (for a hospital); *Dunn v. Morse*, 109 Me. 254 (to be given to institutions for the relief of suffering humanity); *Petition of Pierce*, 109 Me. 509 (for founding a home for indigent seamen); *Searp v. Chapman*, 158 Mass. 400 (for the benefit of the inhabitants of A for educational purposes); *Chase v. Dickey*, 212 Mass. 555 (for the promotion of Christian Science); *French v. Lawrence*, 76 N. H. 234 (to feeble Congregational churches of N. H.); *A. G. v. Goodell*, 180 Mass. 538 (to be divided among the poor colored people of A); *Bruere v. Cook*, 63 N. J. Eq. 624 (for home and foreign missions of the Baptist Church); *Case v. Hasse*, 83 N. J. Eq. 170 (to the poor children of A for a summer home); *Bowman v. Domestic & Foreign etc. Society*, 182 N. Y. 494 (for Indian and domestic missions); *Stewart v. Franchetti*, 167 N. Y. App. Div. 541 (to be spent in charity in Italy and New York); *State v. Gerard*, 37 N. C. 210 (to the poor of A); *Hagen v. Sacrison*, 19 N. D. 160 (for poor children of A); *Urmey's Ex. v. Wooden*, 1 Oh. St. 160 (to the poor and needy of A); *Sawtelle v. Witham*, 94 Wis. 412 (for support and education of indigent orphan children of A); *Hood v. Dorer*, 107 Wis. 149 (for the support and maintenance of superannuated preachers of a church).

On the other hand in the following cases it was held that the trust failed: *Fountain v. Ravenel*, 17 How. (U. S.) 369 (for the use of charitable institutions in Pennsylvania and South Carolina as T may deem most beneficial to mankind); *Hadley v. Forsee*, 203 Mo. 418 (to the testator's wife to advance the cause of religion and promote the cause of charity in such manner as she may think would be most conducive to carry out his wishes).

In the following cases where property was left for charitable purposes, but the testator did not indicate what charitable purposes he intended and did not name any trustee to determine the purposes, it was held that the trust failed: *Korsstrom v. Barnes*, 167 Fed. 216; *Booc v. Vinson*, 104 Ark. 439; *Norcross v. Murphy*, 44 N. J. Eq. 552.

In the following cases it was held that although the purpose of the testator was charitable and the trustee named was ready and willing to perform, yet since the purpose was indefinite, the trust failed: *Woodroof v. Hundley*, 147 Ala. 287 (to such objects of charity and benevolence as the Presbytery of a certain church may indicate); *Crim v. Williamson*, 180 Ala. 179 (aiding worthy objects of charity in T's discretion); *Spalding v. St. Joseph's Ind. School*, 107 Ky. 382 (for charitable objects in the diocese of Louisville according to T's discretion); *Succession of Burke*, 51 La. Ann. 538 (to use for any charitable institution T may select); *Succession of McCloskey*, 52 La. Ann.

1122 (for such charitable uses and purposes for Ireland as T thinks proper); Succession of Villa, 132 La. 714 (to T to be used for any good work he may see fit to use it for); Johnson v. Johnson, 92 Tenn. 559 (for some charitable purpose, preferably something of an educational nature, although permissible to appropriate income as T may elect); Webster v. Morris, 66 Wis. 366 (to be expended by T for charitable purposes). See the note to Morice v. Bishop of Durham, *ante*, p. 275.

If a testator devises land to an unincorporated charitable association, the trust will not fail but the title will descend to the testator's heir who will take subject to the trust, until a new trustee is appointed. If the association is later incorporated, the court may order a conveyance to it. American Bible Society v. American Tract Society, 62 N. J. Eq. 219.

In New York however it is held that a devise or bequest directly to an unincorporated association for its general purposes does not create a trust for the purposes of the association and is invalid. Mount v. Tuttle, 183 N. Y. 358, 367; Fralick v. Lyford, 107 N. Y. App. Div. 543, *aff'd* 187 N. Y. 524; Ely v. Magie, 219 N. Y. 112, 143.

A bequest in general terms for religious purposes is generally held valid. A. G. v. Stepney, 10 Ves. 22; *Re Lea*, 34 Ch. D. 528; *Re Darling*, [1896] 1 Ch. 50; *Re Garrard*, [1907] 1 Ch. 382; Powerscourt v. Powerscourt, Beatty (Ir.) 572; Phelps v. Lord, 25 Ont. 259; Bartlet v. King, 12 Mass. 537; Going v. Emery, 16 Pick. (Mass.) 107; Hinckley v. Thatcher, 139 Mass. 477; Miller v. Teachout, 24 Oh. St. 525; Pell v. Mercer, 14 R. I. 412.

On the prerogative power of the King as *parens patriæ* to direct the application of property devoted to charity, see Gray, Rule ag. Perp., sec. 608n. See Mormon Church v. United States, 136 U. S. 1.

THE CASE OF THETFORD SCHOOL.

HOUSE OF LORDS. 1609. •

8 Rep. 130 b.

UPON a private bill exhibited in the parliament for erection of a free-school, maintenance of a preacher, and of four poor people, *scil.* two poor men and two poor women, according to the will of Sir Thomas Fulmerston, Kt., a question was moved by the Lords, and was such: land of the value of 35*l.* anno 9 *Eliz. Reginae*, was devised by will in writing to certain persons and their heirs, for the maintenance of a preacher four days in the year, of a master and usher of a free grammar-school, and of certain poor people; and a special distribution was made by the testator himself, in the same will, amongst them, of the revenues, *scil.* to the preacher a certain sum, and certain sums to the schoolmaster and usher, and to the poor people, amounting in the whole to 35*l.* *per annum*, which was the yearly profit of the

land at that time; and afterwards the land became of greater value, viz. of the value of 100*l.* per ann. Now two questions were moved: 1. Whether the preacher, schoolmaster, usher, and poor, should have only the said certain sums appointed to them by the founder, or that the revenue and profit of the land should be employed to the increase of the stipend of the preacher, schoolmaster, usher, and poor? 2. If any surplusage remained, how it should be employed? And it was resolved, on hearing of counsel learned on both parts, several days at Serjeant's Inn, by the two Chief Justices, and Walmsley, Justice (to whom the Lords referred the consideration of the case) that the revenue and profit of the said land should be employed to the increase of the stipend of the preacher, schoolmaster, &c. and poor; and if any surplusage remained, it should be expended for the maintenance of a greater number of poor, &c., and nothing should be converted by the devisees to their own uses. So in the case in question, where lands in Croxton, in the county of Norfolk, were devised by Sir Richard Fulmerston, to his executors, to find the said works of piety and charity, with such certain distribution as is aforesaid; and now the value of the manor was greatly increased, that it shall be employed in performance and increase of the said works of piety and charity instituted and erected by the founder: for it appears by his distribution of the profits, that he intended the whole should be employed in works of piety and charity, and nothing should be converted to the private use of the executors or their heirs. And this resolution is grounded on evident and apparent reason; for, as if the lands had decreased in value, the preacher, schoolmaster &c. and poor people, should lose; so when the lands increase in value, *pari ratione* they shall gain. And they said, that this case concerned the colleges in the universities of Cambridge and Oxford, and other colleges, &c. For in ancient time, when lands were of small yearly value, (victuals then being cheap) and were given for the maintenance of poor scholars, &c. and that every scholar, &c. should have 1*d.* or 1*d. ob.* a day, that then such small allowance was competent in respect of the price of victuals, and the yearly value of the land; and now the price of victuals being increased, and with them the annual value of the lands, it would be now injurious to allow a poor scholar 1*d.* or 1*d. ob.* a day, which cannot keep him, and to convert the residue to private uses, where, in right, the whole ought to be employed to the maintenance or increase (if it may

be) of such works of piety and charity which the founder has expressed, and nothing to any private use; for every college is seised *in jure collegii, scilicet*, to the intent that the members of the college, according to the intent of the founder, should take the benefit, and that nothing should be converted to private uses. *Panis egentium vita pauperum, et qui defraudat eos homo sanguinis est.* And afterwards, upon conference had with the other Justices, they were of the same opinion; and according to their opinions, the bill passed in both houses of Parliament, and afterwards was confirmed by the King's royal assent. Note, reader, there is a good rule in the act of Parliament called *Statutum Templariorum: ita semper quod pia et celeberrima voluntas donatorum in omnibus teneatur et expleatur, et perpetuo sanctissime perseveret.*¹

¹In some cases the courts have found an intention shown by the testator to allow the trustee to keep the surplus. *Attorney General v. Dean and Canons of Windsor*, 8 H. L. C. 369 (will of Hen. VIII and letters patent of Ed. VI; trustee a charitable corporation); *A. G. v. Rector, etc., of Trinity Church*, 9 Allen (Mass.) 422 (trustee a charitable corporation). And if there is no general charitable purpose and no intent to give the trustee any beneficial interest, there may be a resulting trust of the surplus. See *A. G. v. Mayor of Bristol*, 2 Jac. & W. 294, 308.

"With respect to the application of surplus rents:—When a testator has devised his estate to charitable uses, and has pointed out the particular objects of his bounty, the court construe his intention imperatively to be, not only in exclusion of his next of kin, but to the disinheriting of his heir at law; and they uniformly decree the surplus rents and profits to the augmentation of the charities, upon the ground, that, as the charity must have borne the loss if the value of the thing devised had decreased, it shall enjoy the benefit of its increase (*Case of Thetford School*, 8 Co. 130; *Arnold v. A. G.*, Show. P. C. 22; *A. G. v. Mayor of Coventry*, Colles's P. C. 280, 2 Bro. P. C. 236, 2 Vern. 397; *A. G. v. Price*, 3 Atk. 109; *A. G. v. Smart*, 1 Ves. 72; *A. G. v. Johnson*, Amb. 190; *A. G. v. Sparks*, Amb. 201; *Shepherd v. Corporation of Bristol*, 3 Mad. Rep. 320); and the court will either increase the bounty limited to the objects (*A. G. v. Minshull*, 4 Ves. 11), or if the fund is very considerable in proportion to the objects it will apply the surplus upon the principle of *cy pres* for the benefit of the same objects to purposes not expressly pointed out by the will (*The Bishop of Hereford v. Adams*, 7 Ves. 324); or, after providing for the maintenance of those already established, will extend the bounty by increasing the number of objects of the same description with those pointed out by the testator. *A. G. v. Earl of Winchelsea*, 3 Bro. C. C. 373; *A. G. v. Haberdashers' Company or Turner*, 2 Ves. Jun. 1, 4 Bro. C. C. 103; *A. G. v. Hurst*, 2 Cox 365; *A. G. v. Wansey*, 15 Ves. 231; *A. G. v. The Coopers' Company*, 19 Ves. 187." Porter's Case, 1 Rep. 22a, b, note W 1. See also *A. G. v. Mayor of Bristol*, 2 Jac. & W. 294; *Merchant Taylors' Co. v. A. G.*, L. R. 6 Ch. 512; *A. G. v. Wax Chandlers' Co.*, L. R. 6 H. L. 1; *Tudor, Charities*, 110–117.

JACKSON *v.* PHILLIPS.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1867.

14 Allen 539.

BILL in equity by the executor of the will of Francis Jackson of Boston (who died in 1861) for instruction as to the validity and effect of various bequests and devises.

In Article 4th the testator bequeathed to trustees \$10,000 "in trust, nevertheless, for them to use and expend at their discretion, without any responsibility to any one, in such sums, at such times and such places, as they deem best, for the preparation and circulation of books, newspapers, the delivery of speeches, lectures, and such other means, as, in their judgment will create a public sentiment that will put an end to negro slavery in this country. . . . I hope and trust that they will receive the services and sympathy, the donations and bequests, of the friends of the slave."

In Article 5th the testator bequeathed to the same trustees \$2000 "in trust, nevertheless, to be expended by them at their discretion, without any responsibility to any one, for the benefit of fugitive slaves who may escape from the slaveholding states of this infamous Union from time to time."

One argument was had in March 1863, after which the court ordered the attorney general to be made a party, which was done, and he submitted the case without argument, and a second argument by the other counsel was had in November 1865. While the case was under advisement, the thirteenth article of amendment of the Constitution of the United States was adopted, and the effect of this amendment upon the case was argued in March 1866.

GRAY, J.¹ . . . By the thirteenth amendment of the Constitution of the United States, adopted since the earlier arguments of this case, it is declared that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." The effect of this amendment upon the charitable bequests of Francis Jackson is the remaining question to be determined; and this requires a

¹ The statement of facts is abridged and a part of the opinion is omitted.

consideration of the nature and proper limits of the doctrine of *cy pres*.

It is contended for the heirs at law, that the power of the English chancellor, when a charitable trust cannot be administered according to its terms, to execute it so as to carry out the donor's intention as nearly as possible — *cy pres* — is derived from the royal prerogative or the St. of 43 Eliz. and is not an exercise of judicial authority; that, whether this power is prerogative or judicial, it cannot, or, if it can, should not, be exercised by this court; and that the doctrine of *cy pres*, even as administered in the English chancery, would not sustain these charitable bequests since slavery has been abolished.

Much confusion of ideas has arisen from the use of the term *cy pres* in the books to describe two distinct powers exercised by the English chancellor in charity cases, the one under the sign manual of the crown, the other under the general jurisdiction in equity; as well as to designate the rule of construction which has sometimes been applied to executory devises or powers of appointment to individuals, in order to avoid the objection of remoteness. It was of this last, and not of any doctrine peculiar to charities, that Lord Kenyon said, "The doctrine of *cy pres* goes to the utmost verge of the law, and we must take care that it does not run wild;" and Lord Eldon, "It is not proper to go one step farther." *Brudenell v. Elwes*, 1 East, 451; s. c. 7 Ves. 390. 1 Jarman on Wills, 261-263. Sugden on Powers, c. 9, sect. 9. *Coster v. Lorillard*, 14 Wend. 309, 348.

The principal, if not the only, cases in which the disposition of a charity is held to be in the crown by sign manual, are of two classes; the first, of bequests to particular uses charitable in their nature, but illegal, as for a form of religion not tolerated by law; and the second, of gifts of property to charity generally, without any trust interposed, and in which either no appointment is provided for, or the power of appointment is delegated to persons who die without exercising it.

It is by the sign manual and in cases of the first class, that the arbitrary dispositions have been made, which were so justly condemned by Lord Thurlow in *Moggridge v. Thackwell*, 1 Ves. Jr. 469, and Sir William Grant in *Cary v. Abbot*, 7 Ves. 494, 495; and which, through want of due discrimination, have brought so much discredit upon the whole doctrine of *cy pres*. Such was the case of Attorney General *v. Baxter*, in which a bequest to Mr. Baxter to be distributed by him among sixty

pious ejected ministers, (not, as the testator declared, for the sake of their nonconformity, but because he knew many of them to be pious and good men and in great want), was held to be void, and given under the sign manual to Chelsea College; but the decree was afterward reversed, upon the ground that this was really a legacy to sixty individuals to be named. 1 Vern. 248; 2 Vern. 105; 1 Eq. Cas. Ab. 96; 7 Ves. 76. Such also was the case of *Da Costa v. De Pas*, in which a gift for establishing a *jesuba* or assembly for reading the Jewish law was applied to the support of a Christian chapel at a foundling hospital. Amb. 228; 2 Swanst. 489 note; 1 Dick. 258; 7 Ves. 76, 81.

This power of disposal by the sign manual of the crown in direct opposition to the declared intention of the testator, whether it is to be deemed to have belonged to the king as head of the church as well as of the state, "intrusted and empowered to see that nothing be done to the disherison of the crown or the propagation of a false religion;" *Rex v. Portington*, 1 Salk. 162; s. c. 1 Eq. Cas. Ab. 96; or to have been derived from the power exercised by the Roman emperor, who was sovereign legislator as well as supreme interpreter of the laws; Dig. 33, 2, 17; 50, 8, 4; Code, *lib.* 1, *tit.* 2, c. 19; *tit.* 14, c. 12; is clearly a prerogative and not a judicial power, and could not be exercised by this court; and it is difficult to see how it could be held to exist at all in a republic, in which charitable bequests have never been forfeited to the use or submitted to the disposition of the government, because superstitious or illegal. 4 Dane Ab. 239. *Gass v. Wilhite*, 2 Dana, 176. *Methodist Church v. Remington*, 1 Watts, 226.

The second class of bequests which are disposed of by the king's sign manual is of gifts to charity generally, with no uses specified, no trust interposed, and either no provision made for an appointment, or the power of appointment delegated to particular persons who die without exercising it. *Boyle on Charities*, 238, 239. *Attorney General v. Syderfen*, 1 Vern. 224; s. c. 1 Eq. Cas. Ab. 96. *Attorney General v. Fletcher*, 5 Law Journal (N. S.) Ch. 75. This too is not a judicial power of expounding and carrying out the testator's intention, but a prerogative power of ordaining what the testator has failed to express. No instance is reported, or has been discovered in the thorough investigations of the subject, of an exercise of this power in England before the reign of Charles II. *Moggridge v. Thackwell*, 7 Ves. 69-81. *Dwight's Argument in the Rose*

Will Case, 272. It has never, so far as we know, been introduced into the practice of any court in this country; and, if it exists anywhere here, it is in the legislature of the Commonwealth as succeeding to the powers of the king as *parens patriæ*. 4 Kent Com. 508, *note*. *Fontain v. Ravenel*, 17 How. 369, 384. *Moore v. Moore*, 4 Dana, 365, 366. *Witman v. Lex*, 17 S. & R. 93. *Attorney General v. Jolly*, 1 Rich. Eq. 108. *Dickson v. Montgomery*, 1 Swan, 348. *Lepage v. Macnamara*, 5 Iowa, 146. *Bartlet v. King*, 12 Mass. 545. *Sohier v. Massachusetts General Hospital*, 3 Cush. 496, 497. It certainly cannot be exercised by the judiciary of a state whose constitution declares that "the judicial department shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." Declaration of Rights, art. 30.

The jurisdiction of the court of chancery to superintend the administration and decree the performance of gifts to trustees for charitable uses of a kind stated in the gift stands upon different grounds; and is part of its equity jurisdiction over trusts, which is shown by abundant evidence to have existed before the passage of the Statute of Charitable Uses. . . .

A charity, being a trust in the support and execution of which the whole public is concerned, and which is therefore allowed by the law to be perpetual, deserves and often requires the exercise of a larger discretion by the court of chancery than a mere private trust; for without a large discretionary power, in carrying out the general intent of the donor, to vary the details of administration, and even the mode of application, many charities would fail by change of circumstances and the happening of contingencies which no human foresight could provide against; and the probabilities of such failure would increase with the lapse of time and the remoteness of the heirs from the original donor who had in a clear and lawful manner manifested his will to divert his estate from his heirs for the benefit of public charities.

It is accordingly well settled by decisions of the highest authority, that when a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in

the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular directions as possible, to carry out his general charitable intent. In all the cases of charities which have been administered in the English courts of chancery without the aid of the sign manual, the prerogative of the king acting through the chancellor has not been alluded to, except for the purpose of distinguishing it from the power exercised by the court in its inherent equitable jurisdiction with the assistance of its masters in chancery. . . .

The intention of the testator is the guide, or, in the phrase of Lord Coke, the lodestone, of the court; and therefore, whenever a charitable gift can be administered according to his express directions, this court, like the court of chancery in England, is not at liberty to modify it upon considerations of policy or convenience. *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 280. *Baker v. Smith*, 13 Met. 34. *Trustees of Smith Charities v. Northampton*, 10 Allen, 498. But there are several cases, where the charitable trust could not be executed as directed in the will, in which the testator's scheme has been varied by this court in such a way and to such an extent as could not be done in the case of a private trust. Thus bequests to a particular bible society by name, whether a corporation established by law or a voluntary association, which had ceased to exist before the death of the testator, have been sustained, and applied to the distribution of bibles through a trustee appointed by the court for the purpose. *Winslow v. Cummings*, 3 Cush. 358. *Bliss v. American Bible Society*, 2 Allen, 334. . . .

In all the cases cited at the argument, in which a charitable bequest, which might have been lawfully carried out under the circumstances existing at the death of the testator, has been held, upon a change of circumstances, to result to the heirs at law or residuary legatees, the gift was distinctly limited to particular persons or establishments. Such was *Russell v. Kellett*, 3 Sm. & Giff. 264, in which the gift was of five pounds outright to each poor person of a particular description in certain parishes, and Vice Chancellor Stuart held that the shares of those who died before receiving them went to the residuary legatees. Such also was *Clark v. Taylor*, 1 Drewry, 642, in which it was held that a legacy to a certain orphan school by name, which ceased to exist after the death of the testator, failed and

fell into the residue of the estate; and which can hardly be reconciled with the decisions in *Incorporated Society v. Price*, 1 Jones & Lat. 498; s. c. 7 Irish Eq. 260; *In re Clergy Society*, 2 Kay & Johns. 615; *Marsh v. Attorney General*, 2 Johns. & Hem. 61; *Winslow v. Cummings*, 3 Cush. 358, and *Bliss v. American Bible Society*, 2 Allen, 334. So in *Easterbrooks v. Tillinghast*, 5 Gray, 17, the trust was expressly limited, not only in object, but in duration, to the maintenance of the pastor of a certain church of a specified faith and practice in a particular town, "so long as they or their successors shall maintain the visibility of a church in said faith and order;" and could not have been held to have terminated, had it not been so limited. *Attorney General v. Columbine*, Boyle on Charities, 204, 205. *Potter v. Thurston*, 7 R. I. 25. *Dexter v. Gardner*, 7 Allen, 243.

The charitable bequests of Francis Jackson cannot, in the opinion of the court, be regarded as so restricted in their objects, or so limited in point of time, as to have been terminated and destroyed by the abolition of slavery in the United States. They are to a board of trustees for whose continuance careful provision is made in the will, and which the testator expresses a wish may become a permanent organization and may receive the services and sympathy, the donations and bequests, of the friends of the slave. Their duration is not in terms limited, like that of the trust sought to be established in the sixth article of the will, by the accomplishment of the end specified. They take effect from the time of the testator's death, and might then have been lawfully applied in exact conformity with his expressed intentions. The retaining of the funds in the custody of the court while this case has been under advisement cannot affect the question. The gifts being lawful and charitable, and having once vested, the subsequent change of circumstances before the funds have been actually paid over is of no more weight than if they had been paid to the trustees and been administered by them for a century before slavery was extinguished.

Neither the immediate purpose of the testator — the moral education of the people; nor his ultimate object — to better the condition of the African race in this country; has been fully accomplished by the abolition of slavery.

Negro slavery was recognized by our law as an infraction of the rights inseparable from human nature; and tended to promote idleness, selfishness and tyranny in one part of the community, a destruction of the domestic relations and utter

debasement in the other part. The sentiment which would put an end to it is the sentiment of justice, humanity and charity, based upon moral duty, inspired by the most familiar precepts of the Christian religion, and approved by the Constitution of the Commonwealth. The teaching and diffusion of such a sentiment are not of temporary benefit or necessity, but of perpetual obligation. Slavery may be abolished; but to strengthen and confirm the sentiment which opposed it will continue to be useful and desirable so long as selfishness, cruelty, the lust of dominion, and indifference to the rights of the weak, the poor and the ignorant, have a place in the hearts of men. Looking at the trust established by the fourth article of this will as one for the moral education of the people only, the case is within the principle of those, already cited, in which charities for the relief of leprosy and the plague were held not to end with the disappearance of those diseases; and is not essentially different from that of Baliol College, in which a trust for the education at Oxford of Scotch youths, to be sent into Scotland to preach Episcopalianism in the established church there, was applied by Lords Somers and Hardwicke and their successors to educate such youths, although, by the change of faith and practice of the Church of Scotland, the donor's ultimate object could no longer be accomplished.

The intention of Francis Jackson to benefit the negro race appears not only in the leading clause of the fourth article, and in his expression of a hope that his trustees might receive the aid and the gifts of the friends of the slave, but in the trust for the benefit of fugitive slaves in the fifth article of the will, to which, according to the principle established by the house of lords in the case of Betton's Charity, resort may be had to ascertain his intent and the fittest mode of carrying it out. The negroes, although emancipated, still stand in great need of assistance and education. Charities for the relief of the poor have been often held to be well applied to educate them and their children. *Bishop of Hereford v. Adams*, 7 Ves. 324. *Wilkinson v. Malin*, 2 Cr. & Jerv. 636; s. c. 2 Tyrwh. 544. *Anderson v. Wrights of Glasgow*, 12 Law Times, (N. S.) 807. The case of the Mico Charity is directly to the point that a gift for the redemption of poor slaves may be appropriated, after they have been emancipated by law, to educate them; and the reasons given by Lord Cottenham for that decision apply with no less force to those set free by the recent amendment of the

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Constitution in the United States, than to those who were emancipated by act of parliament in the West Indies.

The mode in which the funds bequeathed by the fourth and fifth articles of the will may be best applied to carry out in a lawful manner the charitable intents and purposes of the testator as nearly as possible must be settled by a scheme to be framed by a master and confirmed by the court before the funds are paid over to the trustees. In doing this, the court does not take the charity out of the hands of the trustees, but only declares the law which must be their guide in its administration. Shelford on Mortmain, 651-654. Boyle on Charities, 214-218. The case is therefore to be referred to a master, with liberty to the attorney general and the trustees to submit schemes for his approval; and all further directions are reserved until the coming in of his report.

Case referred to a master.

The case was then referred to John Codman, Esquire, a master in chancery for this county, who, after notice to the trustees and the attorney general, and hearing the parties, made his report, the results of which were approved by the attorney general; and upon exceptions to which the case was argued by W. Phillips for himself and other excepting trustees, and by J. A. Andrew in support of the master's report, before Gray, J. with the agreement that he should consult the whole court before entering a final decree. No account was asked by any party of sums already expended by the trustees.

As to the bequest in the fifth article, the master reported that the unexpended balance (amounting to \$1049.90) was so small that it was reasonable that it should be confined to a limited territory; and that it should therefore be applied by the trustees, in accordance with their unanimous recommendation, to the use of necessitous persons of African descent in the city of Boston and its vicinity. This scheme was approved and confirmed by the court, with this addition: "Preference being given to such as have escaped from slavery."

As to the sum bequeathed in the fourth article of the will, the master reported that a portion had been expended by the trustees before any question arose as to its validity; and that but two schemes had been suggested to him for the appropriation of the residue, namely, first, (which was approved by four of the seven trustees who had accepted the trust,) in part to the support of the Anti-Slavery Standard, and in part to the New

England Branch of the American Freedmen's Union Commission; or, second, (which was approved by the remaining trustees,) that the whole should be applied to the last named object.

The master disapproved of the first of these schemes; and reported that the Anti-Slavery Standard was a weekly newspaper published in the city of New York with a circulation of not more than three thousand copies, which was established nearly thirty years ago for the purpose of acting upon public opinion in favor of the abolition of slavery that in his opinion, since the abolition of slavery, and the passage of the reconstruction acts of congress, "the support of a paper of such limited circulation as hardly to be self-sustaining would do very little for the benefit of the colored people in their present *status*, and its direct influence would be almost imperceptible on the welfare of that class most nearly corresponding to those whom the testator had in view in making this bequest;" and that the argument, that it was evidently the intention of the testator to accomplish the object indicated in the fourth article of his will by means of which a newspaper like this might be considered an example, was answered by the fact that the object for which these means were to be used had been already accomplished without them. The master returned with his report a few numbers of the Anti-Slavery Standard, (taken without selection as they were given to him by the chairman of the trustees,) by which it appeared that it was in large part devoted to urging the passage of laws securing to the freedmen equal political rights with the whites, the keeping of the southern states under military government, the impeachment of the president, and other political measures.

The master reported that he was unable to devise any better plan than the second scheme suggested; that this mode of appropriation was in his opinion most in accordance with the intention of the testator as expressed in the fourth article of the will, because the intention nearest to that of emancipating the slaves was by educating the emancipated slaves to render them capable of self-government, and this could best be done by an organized society, expressly intended and exactly fitted for this function, and which, if the whole or any part of this fund was to be applied to the direct education and support of the freedmen, was admitted at the hearing before him to be the fittest channel for the appropriation. The master returned with his report printed documents by which it appeared that the object of the American Freedmen's Union Commission, as stated in its con-

stitution, was "the relief, education and elevation of the freedmen of the United States, and to aid and coöperate with the people of the south, without distinction of race or color, in the improvement of their condition, upon the basis of industry, education, freedom and Christian morality;" and that the New-England and other branches of the commission were now maintaining large numbers of teachers and schools for this purpose throughout the southern states.

The master accordingly reported that what remained of the fund bequeathed by the fourth article of the will should be "ordered to be paid over to the New England Branch of the Freedmen's Union Commission, to be employed and expended by them in promoting the education, support and interests generally of the freedmen (late slaves) in the States of this Union recently in rebellion." And this scheme was by the opinion of the whole court accepted and confirmed, modified only by directing the executor to pay the fund to the trustees, to be by them paid over at such times and in such sums as they in their discretion might think fit to the treasurer of the branch commission; and by substituting for the words "recently in rebellion" the words "in which slavery has been abolished, either by the proclamation of the late President Lincoln or the amendment of the Constitution."

*Final decree accordingly.*¹

¹ Cf. *Hayter v. Trego*, 5 Russ. 113; *Biscoe v. Jackson*, 35 Ch. D. 460; *Re Slevin*, [1891] 2 Ch. 236; *Tincher v. Arnold*, 147 Fed. 665; *Lewis v. Gailard*, 61 Fla. 819; *Grand Prairie Seminary v. Morgan*, 171 Ill. 444; *Lynch v. South Congregational Parish*, 109 Me. 32; *Amory v. A. G.*, 179 Mass. 89; *Osgood v. Rogers*, 186 Mass. 238; *Richardson v. Mullery*, 200 Mass. 247; *Ely v. A. G.*, 202 Mass. 545; *Read v. Willard Hospital*, 215 Mass. 132; *Norris v. Loomis*, 215 Mass. 344; *Missouri Historical Society v. Academy of Science*, 94 Mo. 459; *Women's Christian Association v. Kansas City*, 147 Mo. 103; *Crow v. Clay County*, 196 Mo. 234; *Nichols v. Newark Hospital*, 71 N. J. Eq. 130; *Rector etc. St. James Church v. Wilson*, 82 N. J. Eq. 546; *Camp v. Presbyterian Soc.*, 105 N. Y. Misc. 139; *English v. Johnson*, 42 Tex. Civ. App. 118.

BOWDEN v. BROWN.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1908.

200 Mass. 269.

BILL IN EQUITY, filed in the Probate Court for the county of Essex on October 2, 1908, by the trustees under the will of Sarah E. Goodwin, late of Lynn, for instructions as to the con-

struction of the residuary clause of that will, which is quoted in the opinion.

In the Probate Court Harmon, J., made a decree that the plaintiffs should invest the residue of the estate and hold it so invested with its accumulations for the purposes named in the will, instead of paying it over to the next of kin of the testatrix. The defendants Annie S. Brown and others, claiming as the next of kin of the testatrix, appealed.

The case came on to be heard before Hammond, J., who, at the request of the parties, reserved it upon the bill and the answers of the several defendants for determination by the full court, such decree to be entered as law and justice might require.

KNOWLTON, C. J. Sarah E. Goodwin, late of Marblehead, deceased, after giving certain legacies in her will, provided as follows: "The remainder shall . . . be given to the town of Marblehead toward the erection of a building that should be for the sick and poor, those without homes. I leave this in the hands of William S. Bowden, Mary G. Brown and William Reynolds of Marblehead." This gift constitutes a public charity. *Richardson v. Mullery*, ante, 247, and cases cited. But by the terms of the will, it is to go to a designated donee, to be used for a specified purpose, for the benefit of a certain class of sick and poor. The donee, the town of Marblehead, at a meeting of the voters has declined to accept the legacy. It was given "toward the erection of a building" by the town. The action of the town is equivalent to a refusal to erect such a building. It appears that the charity cannot be administered in the way stated in the will. It therefore must fail altogether, unless it can be administered under the doctrine of *cy pres*. The question arises whether the purpose of the testatrix was to give her property for this specific charity, or whether her charitable purpose was general, so that the court is authorized to apply the money to some other charity, similar to that mentioned in the will, under a scheme to be devised for that purpose. It is manifest that the amount of the property, which is only about \$8,000, is insufficient for the erection and maintenance of such a building as the testatrix contemplated. She expected that the building would be erected and maintained by the town, with such aid as would be derived from the use of her gift. The trust was not for the erection of a building by trustees under her will, entirely from the proceeds of her property. It being impossible to do that which the testatrix had in mind, can we discover a purpose to do something else of a similar character?

We think not. There is nothing to indicate that she intended to make provision generally for the sick and poor of the town, or particularly for those without homes, unless they could be provided with a home in a building to be erected for their use. General provision for the sick and poor would seem to include a charity much broader than anything in her contemplation. The case seems to fall within the class where no intent to use the gift for other charitable purposes can be discovered, if it is impossible to execute the particular charity for which provision is made. In such cases the charity fails altogether. Many cases of this kind are found in the books. See *Teele v. Bishop of Derry*, 168 Mass. 341; *Bullard v. Shirley*, 153 Mass. 559; *Gill v. Attorney General*, 197 Mass. 232, 237; *In re White's Trusts*, 33 Ch. D. 449; *Attorney General v. Bishop of Oxford*, 1 Bro. C. C. 444, note; 4 Ves. Jr. 421; *Brown v. Condit*, 4 Robbins, 440; *Catt v. Catt*, 118 App. Div. (N. Y.) 742.

We are of opinion that the gift fails and that the residuary estate must go to the next of kin.

*So ordered.*¹

¹ In the following cases it was held that the intended trust could not be carried out *cy pres* but failed altogether: *Cherry v. Mott*, 1 Myl. & C. 123 (presentation to educational institution); *Clark v. Taylor*, 1 Drew. 642 (particular orphan school); *Re White's Trusts*, 33 Ch. D. 449 (to erect an almshouse); *Re Rymer*, [1895] 1 Ch. 19 (to a seminary for the education of priests); *Re University etc. Fund*, [1909] 2 Ch. 1 (to assist in establishing an Institute of Medical Science); *Re Wilson*, [1913] 1 Ch. 314 (to erect a school of a particular kind in a particular place); *Re Pecke*, [1918] 1 Ch. 437 (to a society to establish a holiday home); *Burgess's Trustees v. Crawford*, [1912] 8 C. 387 (to erect an industrial school, statute forbidding such private foundation); *Grundy v. Neal*, 147 Ky. 729; *Teele v. Bishop of Derry*, 168 Mass. 341; *Brown v. Condit*, 70 N. J. Eq. 440; *Morristown Trust Co. v. Mayor of Morristown*, 82 N. J. Eq. 521.

For a discussion of the principle governing applications *cy pres*, see *Ironmongers' Co. v. A. G.*, 10 Cl. & F. 908; *Re Prison Charities*, L. R. 16 Eq. 129; *Re Campden Charities*, 18 Ch. D. 310; *Re Queen's School*, [1910] 1 Ch. 796; *Re Weir Hospital*, [1910] 2 Ch. 124; *Ford v. Thomas*, 111 Ga. 439; *Allen v. Trustees of Nasson Institute*, 107 Me. 120; *Davis v. Barnstable*, 154 Mass. 224; *Adams v. Page*, 76 N. H. 96; *Ogden, Petitioner*, 25 R. I. 373; *Tudor, Charities*, 95-119, 140-149, 181-219; 28 L. Quar. Rev. 169.

In England the Charity Commissioners and, in the case of educational charities, the Board of Education, have, subject to appeal, concurrent jurisdiction with the Chancery Division to apply the doctrine of *cy pres* by framing schemes. On the extent of their power, see *Re Campden's Charities*, 18 Ch. D. 310; *Re Queen's School*, [1910] 1 Ch. 796; *Re Weir's Hospital*, [1910] 2 Ch. 132; *Rex v. Board of Education*, [1910] 2 K. B. 179. See also *Bourchier-Chilcott, Administration of Charities*; *Escarra, Les Fondations en Angleterre*, Pt. 3, chaps. 1, 2.

If it is possible and practicable to carry out the intention of the testator, there is no room for the application of the *cy pres* doctrine. *Re Weir Hospital*, [1910] 2 Ch. 124; *Harvard College v. A. G.*, 228 Mass. 396. But see *Re Queen's School*, [1910] 1 Ch. 796.

It has been said that even the legislature has no power to authorize the use of trust funds for other purposes than those designated by the testator, if it is possible and practicable to carry out the testator's purpose. *Cary Library v. Bliss*, 151 Mass. 364; *Crawford v. Nies*, 220 Mass. 61, 224 Mass. 474. It is clear that the legislature has no power to modify the charter of a charitable corporation without its consent. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518. In *State v. Adams*, 44 Mo. 570, it was held such modification was unconstitutional even with the consent of the corporation. But see *Univ. of Maryland v. Williams*, 9 G. & J. (Md.) 365; *St. John's College v. Comptroller*, 23 Md. 629; *Re St. Mary's Church*, 7 S. & R. (Pa.) 517.

A court of equity may authorize alienation of the trust property although alienation is expressly forbidden by the testator. *Stanley v. Colt*, 5 Wall. (U. S.) 119; *Odell v. Odell*, 11 Allen (Mass.) 1; *Lackland v. Walker*, 151 Mo. 210; *Rolfe etc. Asylum v. Lefebvre*, 69 N. H. 238; *Smart v. Town of Durham*, 77 N. H. 56; *Grace Church v. Ange*, 161 N. C. 314; *Trustees of Sailors' Snug Harbor v. Carmody*, 211 N. Y. 286; *Brown v. Meeting Street Baptist Society*, 9 R. I. 177. See Gray, Rule ag. Perp., sec. 590, n. 3; *Tudor, Charities*, 270. In these cases the Attorney General must be a party to the suit. *Bernardsville M. E. Church v. Seney*, 85 N. J. Eq. 271; *Trustees of Sailors' Snug Harbor v. Carmody*, 211 N. Y. 286.

If the trustees are not by the trust instrument given a power to sell land, they have no right to sell without the permission of the court. *Seif v. Krebs*, 239 Pa. 423.

As to the power of the legislature to authorize an alienation of trust property, see *Stanley v. Colt*, 5 Wall. (U. S.) 119; *Bridgeport Public Library v. Burroughs Home*, 85 Conn. 309; *Tharp v. Fleming*, 1 Houst. (Del.) 580; *Trustees v. Laird*, 10 Del. Ch. 118.

Upon a breach of trust by a misuser or by a nonuser, the trust property does not revert to the testator or donor in the absence of an express condition or limitation, if it is still possible to apply the property for the purposes of the trust or to apply it *cy pres*. *Barnard v. Adams*, 58 Fed. 313; *Stuart v. City of Easton*, 74 Fed. 854; *Bridgeport Public Library v. Burroughs Home*, 85 Conn. 309; *Huger v. Protestant Episcopal Church*, 137 Ga. 205; *Carroll County Academy v. Gallatin Academy*, 104 Ky. 621; *Mott v. Morris*, 240 Mo. 137; *Goode v. McPherson*, 51 Mo. 126; *Green v. Blackwell* (N. J. Eq.), 35 Atl. 375; *Mills v. Davison*, 54 N. J. Eq. 659; *Associate Alumni v. Theological Seminary*, 163 N. Y. 417; *Barr v. Weld*, 24 Pa. 84; *Petition of Sellers Church*, 139 Pa. 61; *Strong v. Doty*, 32 Wis. 381. See 11 Corp. Jur. 372. *Perry, Trusts*, sec. 744.

But such a condition or limitation attached to the legal or equitable interest is valid. *Porter's Case*, 1 Rep. 22a, b; *Re Estate of Douglas*, 94 Neb. 280; *Norton v. Valentine*, 151 N. Y. App. Div. 392. See Gray, Rule ag. Perp., secs. 30, 299-311a (right of entry for breach of condition); secs. 31-42, 312, 313 (possibility of reverter after determinable fee); 327a, 603i (resulting trust after equitable interest).

As to the effect of a taking of the property on eminent domain, see *Lyford v. Laconia*, 75 N. H. 220.

CHAPTER IV
RESULTING AND CONSTRUCTIVE TRUSTS

SECTION I.

Where an Express Trust Fails in Whole or in Part.

HARTOPP'S CASE.

COURT OF WARDS. 1591.

Cro. Eliz. 243.

ELIZABETH HARTOPP devised lands to Denham, and three others in fee, to the use of Thomas Hartopp, her brother, and the heir males of his body; and for default of such issue, to the heir females of his body, with other remainders over. Thomas dieth, having issue a daughter, his wife *enseint* with a son, which is afterwards born. And afterwards Elizabeth Hartopp dieth.

The question was, If the son, or daughter, or neither of them should have the land?

And upon argument, it was ruled by WRAY and ANDERSON, *Chief Justices*, KINGSMILL and MORRIS, *Surveyor and Attorney of the Court of Wards*, that neither of them should have the land. For it being devised to the use of Thomas, *ut supra*, and he dying before the devisor, this cannot vest in the heir, for it never vested in the ancestor; for the word "*heirs*" is not to give the immediate estate, but by way of limitation; and if this shall vest in the heir, it shall vest in him as a purchaser, which was not the intent of the devisor, and so shall be void. And they conceived the case doth not differ from Bret and Rigdin's Case, Plowd. 345. But because the office was not fully found, they would not resolve it; but a *melius inquirandum* was awarded.¹

¹ Ackroyd v. Smithson, 1 Bro. C. C. 503; Brooks v. Belfast, 90 Me. 318, *accord*. See *In re Tilt*, 74 L. T. 163 (conveyance by deed in trust for one who

SALUSBURY v. DENTON.

CHANCERY. 1857.

3 Kay & J. 529.

LYNCH BURROUGHS, by his will in 1835, referring to a policy of insurance which he had settled upon his marriage, upon trust as to 2000*l.*, part of the proceeds, for his wife absolutely, and, as to the residue, upon certain trusts under which, in the event of her surviving him, she was entitled to a life interest therein, with remainder to himself absolutely, proceeded to dispose of his interest as follows: "Now with reference to my policy in the Equitable, No.——, as settled by my marriage settlement on my dear wife, with absolute disposal of 2000*l.* thereof if she survive me, I leave the same, on her decease, to be divided (whatever may have proved the amount of the claim) one moiety thereof to my daughter," the plaintiff, "(if living) for her life therewith, and the other moiety to be at the disposal,

was dead at the time of the conveyance). The result is the same where the trust fails for other reasons. *In re Scott*, [1911] 2 Ch. 374 (disclaimer by beneficiary).

If personal property is bequeathed upon trusts which fail and the testator leaves no next of kin, the beneficial interest passes to the Crown or to the State. *Taylor v. Haygarth*, 14 Sim. 8. If real property is devised upon trusts which fail and the testator leaves no heir, formerly the trustee was allowed to keep the property. *Taylor v. Haygarth*, *supra*. Compare *Burgess v. Wheate*, 1 W. Bl. 123. But, by the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71, sec. 4), in England, and generally by statute or at common law in this country, the beneficial interest in realty as in personalty passes to the Crown or the State. See *Johnston v. Spicer*, 107 N. Y. 185; *Commonwealth v. Naile*, 88 Pa. 429.

If the will or deed of settlement shows an intention to give the beneficial interest to the trustee in the event of the failure of the trusts declared, there will of course be no resulting trust. *Wright v. Row*, 1 Bro. C. C. 60. Similarly where a testator devises a term for years to trustees for a particular purpose and the land *subject thereto* is devised over to another, and the purpose fails, the latter is entitled to the beneficial interest in the term. *Sidney v. Shelley*, 19 Ves. 352, G. Coop. 206; *Jarman, Wills*, 6th ed., 723. See *Randall v. Randall*, 85 Md. 430; *Hall v. Smith*, 61 N. H. 144. Compare *Carrick v. Errington*, 2 P. Wms. 361, and *In re Scott*, [1911] 2 Ch. 374.

As to conflicting claims of the next of kin and the heir of a testator who has directed a conversion of the property bequeathed or devised, see 6 Gray, *Cases on Property*, 2d ed., pp. 382 *et seq.*

As to conflicting claims of the next of kin and the residuary legatee, and conflicting claims of the heir and residuary devisee, to lapsed and void shares of the residue, see 4 Gray, *Cases on Property*, 2d ed., pp. 362-371.

by her will, of my dear wife therewith to apply a part to the foundation of a charity school, or such other charitable endowment for the benefit of the poor of Offley as she may prefer, and under such regulations as she may prescribe herself; and the remainder of said moiety to be at her disposal among my relatives, in such proportions as she may be pleased to direct." The testator bequeathed his residuary personalty to his wife as his sole residuary legatee.

By a codicil to his will the testator gave the first mentioned moiety to Sir Charles Salusbury absolutely, subject to the plaintiff's life interest therein.

The testator died in 1837, leaving the plaintiff his only child.

His widow died in 1856, without having made any will or any disposition of the second moiety; and administration of her estate and effects was granted to the defendant Maria Newberry.

The proceeds of the policy were now represented by 11,619*l.* 16*s.* 2*d.*, 3 per cent. Consols.

The bill prayed that the trusts of the will, so far as related to this sum, might be carried into execution under the direction of the Court.

VICE-CHANCELLOR SIR W. PAGE WOOD: The question in this case arises upon the will of Lynch Burroughs, who having, upon his marriage, settled a certain policy of insurance upon trust, as to 2000*l.*, part of the proceeds for his wife absolutely; and as to the residue upon certain trusts under which, in the event of her surviving him, she would be entitled to a life interest therein, with remainder to himself absolutely, by his will disposed of his interest as follows:—[His Honour read the passage from the will set out above.] Then by a codicil the testator bequeathed the moiety, in which his daughter has a life interest, to Sir Charles Salusbury, subject to the life interest of his daughter, so that the only question is as to the second moiety.

As regards this second moiety, he directs it to be at his wife's disposal by her will "*to apply* a part to the foundation of a charity-school or such other charitable endowment for the benefit of the poor of Offley as she may prefer, and under such regulations as she may prescribe herself, and the remainder to be at her disposal among his relatives in such proportions as she may be pleased to direct."

The first question that was argued was, whether as to the part intended by the testator for charitable purposes, the gift was or was not void; and as to this part of the case I have no doubt, as I said at the close of the argument, that it was not void, because under the terms of the will the widow had an option, — she was at liberty to apply that part “to the foundation of a charity-school, or such other charitable endowment,” as in the will mentioned. And whatever may be the effect of the words “foundation of a charity-school,” occurring in the first branch of that alternative, it is clear as to the second, — the foundation of a charitable endowment, — that a bequest for such a purpose would be a lawful bequest, and not void under the stat. 9 Geo. 2, c. 36.

The gift, therefore, amounts to a bequest of the fund in question to be at his wife’s disposal by her will, therewith “to apply” a part to the foundation of such charitable endowment for the benefit of the poor of Offley as she may prefer, and under such regulations as she may prescribe, and the remainder “to be at her disposal among” the testator’s relatives in such proportions as she may direct.

Now, if either of these purposes had been mentioned alone, the case would be disposed of at once. The words “to apply,” “to be at her disposal among,” are much stronger in favour of construing this as a trust than those in *Brown v. Higgs*, 4 Ves. 708, 5 *Id.* 495, 8 *Id.* 561, where the words, “I authorise and empower,” might have been said to create a mere authority, and not a trust. And this is clearly the view which Lord St. Leonards takes of a will like the present, in his treatise on “Powers,” where he is discussing the case of the Duke of Marlborough *v.* Lord Godolphin, 2 Ves., sen. 61, and that of *Harding v. Glyn*, 1 Atk. 469, S. C. 5 Ves. 501. Admitting that there was a distinction between the two cases, he says, in effect, that where there is a power of selection among certain objects, and an intention manifested that the objects should not be disappointed, — for instance, where there is a bequest to the testator’s wife for life, and after her decease *to be divided or distributed* amongst such of his children as she should appoint, — as the right to exclude some, does not prevent the class from taking in default of appointment, it would now be held, notwithstanding the decision in the Duke of Marlborough *v.* Lord Godolphin, that the children take in default of appointment,

either by implication, or because the power is coupled with a trust, 2 Sug. Pow. 163.

Here, I can have no doubt that the words "to apply" and "to be at her disposal among," are clearly sufficient to create a trust; and that if this had been simply a bequest of the whole, to be at the widow's disposal among the testator's relatives in such proportions as she might direct, the widow dying without having so disposed of it, the whole would go to the plaintiff, as the testator's only child, and the only one of his relatives capable of taking within the Statutes of Distribution, (see 2 Sug. Pow. 237); although, having this power of disposal among his "relatives," the widow might have exercised it, had she been so minded, in such manner as to include persons more distantly related to the testator. See *Harding v. Glyn*, *ubi supra*.

Then the question arises, whether the bequest in this case is void for uncertainty, it being only to be at the disposal of the widow "as to a part" (without saying what part) for one set of objects, and "as to the remainder" for another.¹ . . .

Here there is a plain direction to the widow to give a part to the charitable purposes referred to in the will as she may think fit, and the remainder among the testator's relatives as she may direct. And the widow having died without exercising that discretion, the moiety in question must be divided equally.

There will be a declaration, that, as to one moiety, Sir Charles Salusbury is entitled absolutely, subject to the Plaintiff's life interest therein, and that the other moiety is divisible in equal parts, one of such parts to be for charitable purposes, and the other for the Plaintiff absolutely, as the only person entitled under the Statutes of Distribution. There must also be a reference to chambers to settle the scheme for the application of the part devoted to charitable purposes.²

¹ A part of the opinion is omitted in which the court discussed the following cases: *Fordyce v. Bridges*, 2 Phil. 497; *Longmore v. Broom*, 7 Ves. 124; *Doyley v. The Attorney General*, 4 Viner's Abr. 485, 486; *Down v. Worrall*, 1 Myl. & K. 561.

² See 5 Gray, *Cases on Property*, 2d. ed., pp. 333 *et seq.*; 25 *Harvard Law Review* 1.

In re GREAT BERLIN STEAMBOAT COMPANY.

COURT OF APPEAL. 1884.

26 Ch. D. 616.

THE company was formed on the 21st of April, 1882, for the acquisition and working of a concession from the German Government for the running a line of steamers on the River Spree and the ship canal from Berlin to Spandau. The nominal capital was £50,000, in 10,000 shares of £5 each, but no allotment of shares was ever made, and no shares were subscribed for except the seven shares agreed to be taken by the seven subscribers to the memorandum, which they had not paid for.

The Appellant, J. P. Bowden, deposed that about the 21st of March, 1883, he was applied to through his solicitors by the directors of the company to transfer a sum of £1000 to the credit of the company at their bankers, Messrs. Glyn, Mills, & Co., so that they might have a creditable balance in case of inquiries from certain Berlin bankers with whom they were endeavouring to place a number of the shares of the company, it being agreed that the sum was not to be used for the general purposes of the company, and that the company were merely to hold the sum as trustees for him.

The Appellant further deposed that on the 21st of March, 1883, the following resolution was passed by the board:—

“Resolved to accept £1000 for a period of one month from Mr. J. P. Bowden for the purpose of having it placed at Messrs. Glyn, Mills, Currie, & Co. to the credit of the company, for the purpose of having a creditable balance in case of inquiries from Berlin bankers, but not for the general purposes of the company, such money to be returned intact at the expiration of one month. No cheque to be drawn by the company unless countersigned by the financial secretary *pro tem.*, the company merely holding such sum as trustee for the said J. P. Bowden. Further, to appoint Mr. A. E. Bunn financial secretary *pro tem.* for two months certain without salary, or until the £1000 is repaid, but with power for the said A. E. Bunn to resign at seven days’ notice within that period.”

The £1000 was paid by Bowden to the credit of the company.

Subsequently the Appellant was applied to by the directors to allow sums to be drawn out from the above £1000 for the purposes of the company, and he assented to this. The greater part of it was accordingly drawn out by cheques countersigned by the above-named Mr. A. E. Bunn, who was one of the Appellant's solicitors, and applied for purposes not alleged to be improper, leaving a balance of £99 15s. It appeared that the company never had any other money to its credit than Bowden's £1000.

It appeared that no Berlin banker ever made any inquiry as to the funds of the company, and in November, 1883, a letter was received from Berlin which shewed that no application by any Berlin banker was to be expected.

On the 12th of January, 1884, an order was made for the compulsory winding-up of the company. The £99 15s. was then standing to the credit of the company. Bowden made an affidavit in opposition, in which he stated himself to be a creditor for £1350, but did not say anything as to his claim to the £99 15s.

Bowden claimed to prove against the company for £1350, which appeared not to include the £99 15s.

On the 21st of February, 1884, Bowden took out a summons in the winding-up to have the £99 15s. paid to him. The application was adjourned into Court, and on the 7th of March, 1884, Vice-Chancellor Bacon dismissed it with costs.

Bowden appealed, and the appeal was heard on the 7th of May, 1884.

Upjohn, for the Appellant. It is alleged that the deposit was made for a fraudulent purpose and therefore cannot be recovered. But the purpose for which the money was deposited failed, so as the fraud (if any) was only inchoate, I have a right to revoke the arrangement and have my money back so far as it has not been applied: *Symes v. Hughes* (Law Rep. 9 Eq. 475); *Taylor v. Bowers* (1 Q. B. D. 291). The drawings out must be attributed in my favour, *Knatchbull v. Hallett* (13 Ch. D. 696), if any other moneys have been paid in, this being trust money; but on the evidence it does not appear that the company ever had any other money to its account.

Marten, Q. C., and *Ryland*, *contra*. The Vice-Chancellor said that if a man puts money into the hands of the company to give it a fictitious credit, that is a fraud, and he cannot

then turn round and say that the money is his. As to *Symes v. Hughes*, nothing had occurred to prevent repudiation of the illegal agreement. Here nothing was done to repudiate it till after the commencement of the winding-up. *Taylor v. Bowers* is inapplicable for the same reason. *Knatchbull v. Hallett* does not apply, for this is a case of a fraudulent loan, not of trust. There was a fraudulent intent to deceive not only the Berlin bankers but the public, and this intention continued till the commencement of the winding-up which fixes the rights of the parties. The present is an attempt by a lender to be paid in full.

Upjohn, in reply. The commencement of the winding-up prevents any subsequent alteration in rights of property, but I say that this was my property all along. The commencement of the winding-up puts an end to the purpose for which the money was advanced, and so takes the case out of the objection that the fraud continues.

BAGGALLAY, L. J. In my opinion this appeal fails. On the 21st of March, 1883, a resolution was passed by the directors in these terms. [His Lordship read the resolution.] It is not disputed that the £1000 was placed by the Appellant to the credit of the company at the bank of Glyn & Co. for a fraudulent purpose. But the Appellant says that the money was never applied for any fraudulent purpose, that the purpose came to an end, and that he is entitled to have the money back as being impressed with a trust in his favour. What happened was, that about £900 was drawn out pursuant to resolutions of the directors with the consent of the Appellant, for purposes which were not fraudulent, and was applied accordingly. In November last a communication was received by the directors from a person who was negotiating for them at Berlin, from which it appeared that no applications had been made by any Berlin bankers, and that none were to be expected. In the view I take of the case I think it was then open to the Appellant to say at once, "The purpose for which this money was advanced cannot be carried into effect; pay me back the balance." But the Appellant did not recall his money. It was possible, though not probable, that applications might still be received from Berlin bankers, and that the scheme might be carried out. The Appellant, however, did nothing to repudiate the arrangement, and so matters remained till the presentation of the petition to wind up. Then, after

a winding-up order has been made, he brings forward this claim. There have been cases in which a party who has parted with his property under a fraudulent arrangement, has nevertheless been allowed to recover the property, but this case differs from them in many respects, especially in this, that there was no repudiation till after the commencement of the winding-up. *

COTTON, L. J. I am of opinion that the decision of the Vice-Chancellor is right. I think it the just result of the evidence that the balance now in dispute is ear-marked as part of the money which the Appellant advanced. Then the Appellant says that the company were to hold this sum in trust for him, and the resolution no doubt says that they shall. But that declaration of trust is coupled with a statement that the advance is made in order that the company may appear to have a creditable balance at their bankers if inquiries are made — a purpose which is admitted to be fraudulent. The money was to be represented to be the money of the company, but by a private arrangement it was not to be their money. Then it is said that a person who parts with his property for a fraudulent purpose may repudiate the bargain and get his property back. I give no opinion whether in November last the Appellant could have done so. He did not attempt to do so, but waited till the event happened which put an end to the purpose for which the money was deposited. He left the money at the bank as long as the possibility of carrying out the illegal purpose continued, and it is now too late for him to reclaim it. Assuming that he had the right to repudiate the bargain, he has, in my opinion, lost that right.

LINDLEY, L. J. I also am of opinion that the decision of the Vice-Chancellor is correct. I am not satisfied that this was not a case of loan as distinguished from trust, and if that is the true view it is fatal to the Appellant's case. But if it was a case of trust, the Appellant must shew what the trust was. He does so, and shews an illegal trust, since the purpose of the advance was to give a fictitious credit to the company. The trust at first was to last only for a month. The sum was drawn upon, and the residue was left in the hands of the company to get them credit. If the case is one of debt the Appellant is not entitled to be paid in full. Whether it was loan or trust, I think that the Appellant might have recalled the money at

the end of the month. He did not do so, but left it where it was till the commencement of the winding-up. The object for which the advance was made was attained as the company continued to have a fictitious credit till the commencement of the winding-up. After that I think it is too late for the Appellant to repudiate the bargain and claim the money.¹

In re VAN HAGAN.
SPERLING *v.* ROCHFORD.

COURT OF APPEAL. 1880.

16 Ch. D. 18.

HENRY VAN HAGAN, by his will, dated in 1826, gave to his mother a general power of appointment over certain real estate, provided always that should his mother die without any will, then he gave the said real estate to Edward Clarke, subject to the payment of certain legacies. The mother of the testator many years afterwards made her will, containing a direction to this effect, — “and as to and concerning all the real estate whatsoever and wheresoever, of or to which I or any person or persons in trust for me am, is, or are seised or in any way entitled, or over which I have (either under or by virtue of the will of my deceased son), or over which I shall have any power to dispose, I give, limit, direct, and appoint the same unto and to the use of J. Sperling, F. Wollaston,

¹ See *Ward v. Lant*, Prec. Ch. 182 (conveyance to escape taxes); *Birch v. Blagrove*, 1 Amb. 264 (conveyance to avoid being sheriff); *Dent v. Ferguson*, 132 U. S. 50 (conveyance in fraud of creditors); *Baird v. Howison*, 154 Ala. 359 (like preceding case). Compare Keener, *Quasi-Contracts*, pp. 258 *et seq.*; Woodward, *Quasi Contracts*, secs. 132 *et seq.*; Bump, *Fraudulent Conveyances*, 4th ed., secs. 432 *et seq.*

In the following cases in which the intended trust failed because it was illegal, a resulting trust was raised: *Carrick v. Errington*, 2 P. Wms. 361 (devise in trust for papist); *Attorney General v. Weymouth*, 1 Amb. 20 (devise in trust for charity); *Jones v. Mitchell*, 1 S. & S. 290 (like preceding case); *West v. Shuttleworth*, 2 Myl. & K. 684 (bequest for superstitious use); *De Themmines v. De Bonneval*, 5 Russ. 288 (transfer *inter vivos* for superstitious use); *In re Blundell's Trusts*, 30 Beav. 360 (like preceding case); *Tregonwell v. Sydenham*, 3 Dow 194 (devise on trust void for remoteness); *Dorrian v. Gilmore*, L. R. 15 Ir. 69 (like preceding case); *Symes v. Hughes*, L. R. 9 Eq. 475 (conveyance in fraud of creditors, debtor repentant); *Carll v. Emery*, 148 Mass. 32 (like preceding case); *Lemmond v. Peoples*, 6 Ired. Eq. (N. C.) 137 (transfer of slaves for purpose of emancipation). Compare *Taylor v. Bowers*, 1 Q. B. D. 291; *Herman v. Jeuchner*, 15 Q. B. D. 560.

and G. Sperling, their heirs and assigns, in trust for George R. Green, his heirs and assigns, forever." George R. Green died in the lifetime of the testatrix, and a question was now raised whether the property went as in default of appointment, under the will of Henry Van Hagan, or whether it went as part of the real estate of the testatrix.¹

JESSEL, M. R. This case has been decided by the Vice-Chancellor, not on any general ground of law applicable to the exercise of all general powers of appointment, but on the ground that there is a distinction between real and personal estate as regards the exercise of such powers. Now I wish to say, in the first place, that I think there are quite sufficient distinctions in our law between real and personal estate without introducing a new one for the first time, and if in the case of personal estate the exercise of a general power of appointment in favour of a trustee for a legatee who dies in the lifetime of the testator takes effect so as to make the property in substance the testator's own, I see no reason why the same rule should not apply to an appointment of real estate. In fact, to a slight extent, it appears to me that the case of real estate is the stronger of the two, because in the case of an appointment of real estate there is an actual legal estate carrying with it the right of possession which must be disturbed by those who claim the property under the limitations in default of appointment. The Vice-Chancellor does not suggest that, taking the law to be the same as regards both real and personal estate, the Appellant is not entitled to succeed.

Having thus disposed of the only reason for that decision, I will consider in a very few words (for it has been considered so often by myself and by the Lord Justice JAMES, and by other Judges, that it is not right to go through all the cases) what the effect is of a testamentary appointment under a general power to a trustee in trust for a person who dies in the life of the testator, and therefore cannot take. In the first place, I will consider the intention. The intention of the testator is that the person whom I will call the beneficial legatee or devisee, shall take, and there being nothing in the will to shew that the case of dying in the lifetime, or lapse, was contemplated by the testator, the rule has always been that the

¹ The statement of facts is taken from a report of the case in (1880) W. N. 159.

testator did not contemplate it, but expected that the devisee or legatee would survive him and take accordingly. So that we have to deal with a case as to which there is in some sense no expressed intention, though there is an intention expressed that nobody shall take under the limitations in default of appointment contained in the settlement creating the power, the testator having, according to his belief, disposed of the property, both legally and beneficially, as against the persons claiming under those limitations.

Then the only question remaining is what is to become of the property in case the intention that the beneficial legatee or devisee shall take cannot have effect. That is a mere question of resulting trust. Resulting trust for whom? As already pointed out by Lord Justice JAMES when Vice-Chancellor, it must either be for the original settlor or for the appointor, and, considering that a general power is for almost all purposes equivalent to property, and is so dealt with by the Legislature in the Wills Act as regards testamentary appointments, the fair and proper result, in my opinion, is to treat the trust as resulting to the appointor, so as to carry the property to the person or persons who would take his real or personal estate, as the case may be, or, to put it in the words of Vice-Chancellor WICKENS in the case of *In re Davies' Trusts*, Law Rep. 13 Eq. 166. "It seems settled by the cases of *Chamberlain v. Hutchinson*, 22 Beav. 444, and *Wilkinson v. Schneider*, Law Rep. 9 Eq. 423, authorities which are binding on me, that a testamentary appointment under a general power to A in trust for B, which lapses as to the beneficial interest by B's death before the appointor, operates as a good appointment in favour of A, who holds on the same trusts as if it had been the appointor's own property." There is this also to be said, that the gift to trustees is rational, if the testator knew that it would make the property part of his assets and liable to the payment of his debts. But there does not seem to be any sufficient motive for interposing a trustee when the beneficiary takes absolutely in the case of real estate. I do not, however, rely on that. I prefer to rest my judgment on the general principle which I have already stated.

JAMES, L. J. I am of the same opinion. I concur cordially with the observation of the Master of the Rolls, that it would be very undesirable to re-create any distinction between

personal and real estate, and very desirable not to re-create any distinctions between property and a general power, which, to the common apprehension of mankind, is exactly the same thing as property, and has for many purposes been treated as property.

With regard to the cases which have been cited, I have seen no reason whatever, after having read the judgment of the Vice-Chancellor and heard what has been said by the Respondent, for doubting the accuracy of my previous decisions in the cases of *Brickenden v. Williams*, Law Rep. 7 Eq. 310, and *Wilkinson v. Schneider*, Law Rep. 9 Eq. 423, in the latter of which cases I laid it down that it is not in these cases a question of intention as to what is to be done with the property, but a question of resulting trust. The intention is to execute the power and to take the appointed property out of the settlement, but when the power is once fully executed it is not a question of intention, because nobody can reasonably attribute any particular intention to a testator as to what was to be done in an event that was never in his contemplation. It is a question simply of a resulting trust — what will the law do in a state of things which has happened and as to which the appointor has not made any express provision? Then if the person having a power equivalent to property which would enable him to make that property his own, or make it part of his own estate — if such a person puts that property into the hands of any person for a purpose which only partially requires it, then the resulting trust, in my opinion, is for the person who appointed the trustees and who created the trust. They are trustees for him or her who appointed them trustees, and if there is anything which prevents the whole thing from being disposed of according to the trust, it is their duty to hand it back to the person who created the trust.

COTTON, L. J. As I understand the judgment of the Vice-Chancellor, he decided this case on a distinction between real and personal estate in cases like the present. Certainly there is no case which justifies such a distinction, and I agree with the rest of the Court that we ought not to make such a distinction.

On what ground, then, ought the case to be decided? It is said that it is a question of intention, and, as has been said in former cases by the Lord Justice JAMES and the Master of

the Rolls, it is to a certain extent a question of intention, that is to say, you must see whether or no there is an intention expressed in the instrument exercising the power to dispose absolutely of the property by an exercise of the power of appointment. If you can shew that although there is an exercise of the power there is an intention expressed in the instrument that in the event of the beneficiaries not taking the property under the exercise of the power the original settlement is to remain, then of course it remains. That is an appointment for limited purposes with an intention shewn that in the event of those purposes coming to an end, or for any reason failing, then the original trust is to remain. But here it is absurd to say that we are to consider what the intention of the appointor was in the events which have happened. The events were never contemplated, because she appointed the property absolutely to a person whom she expected to survive her, and who, if he survived her, would put an end to all questions by taking the property absolutely, to the exclusion of everybody else.

In the events that have happened the question is no longer one of intention. The event that has happened was not within the contemplation of the testatrix, and the only question is, what the law under those circumstances will do. The power was exercised, and the property was entirely taken, both as regards the legal and beneficial interest, out of the original settlement. Those who claim under the original settlement cannot, in my opinion, claim it, and this being appointed by the testatrix to her trustees, and the purpose for which it was given to them, as expressed in the will, having failed by the death during her lifetime of the *cestui que trust*, the property goes by way of resulting trust to the person who would be entitled to her real estate. That being so, the decision of the Vice-Chancellor, in my opinion, cannot be supported.

A declaration was made that the property belonged to the surviving appointee, subject to a resulting trust for the heir-at-law, if any, of the testatrix.¹

¹ *In re Scott*, [1891] 1 Ch. 298, *accord*. Compare *Coxen v. Rowland*, [1894] 1 Ch. 406; *In re Boyd*, [1897] 2 Ch. 232.

THE TRUSTEES OF THE METHODIST EPISCOPAL
CHURCH IN THE EAST BALTIMORE STATION
v. THE TRUSTEES OF THE JACKSON SQUARE
EVANGELICAL LUTHERAN CHURCH.

COURT OF APPEALS, MARYLAND. 1896.

84 Md. 173.

BRISCOE, J., delivered the opinion of the Court. The bill in this case is filed for the specific performance of a contract of sale of church property situate in Baltimore City. The case was submitted to the Circuit Court of Baltimore City upon an agreed statement of facts, and from the *pro forma* decree dismissing the bill, this appeal has been taken.

By a lease of the 5th day of December, 1866, Thomas F. Johnson and others, for the consideration of the yearly rent of two hundred and eighty dollars, conveyed for ninety-nine years, to Wm. F. Pentz and seven others and to their successors, lessees in trust, certain property situate in Baltimore City, upon the following trust: "In trust that the said premises shall be used, kept, maintained and disposed of as a place of divine worship for the use of the white ministry and white membership of the Methodist Episcopal Church in the United States of America, subject to the usages and ministerial appointments of said church as from time to time authorized and declared by the General Conference of said church and the Annual Conference in whose bounds the said premises are situate."

On the 20th day of the same month and year, the Jackson Square Centenary Methodist Episcopal Church was duly incorporated under Art. 23 of the Code, and by the act of incorporation, Wm. F. Pentz and the other lessees in trust, named in the lease of the 5th of December, 1866, were constituted trustees of the church. Subsequently, on the 31st of July, 1876, Alexander Ray and four others, the survivors of the trustees named in the lease of the 5th of December, 1866, conveyed absolutely this property to the Jackson Square Centenary M. E. Church, a body corporate, "unto and to the use of the church (by its corporate name) and its assigns, for all the residue of the term yet to come and unexpired therein, with the benefit of renewal forever." And on the 9th day of February, 1889, the Jackson Square Methodist Church granted

and assigned the same property to the appellants, the trustees of the Methodist Episcopal Church in the East Baltimore Station, a body corporate. Afterwards, on the 5th day of April, 1892, the appellants agreed in writing to sell the property to the appellees.

The only question here presented is whether the appellant has a good and marketable title to the property which the appellee has agreed to buy upon the terms set forth in the contract of sale. Now it is very clear, that the trust expressed and contained in the lease from Johnson *et al.* to Pentz *et al.* is void and must fail. In Isaac *et al.*, trustees, v. Emory *et al.*, 64 Md. 337, it was held, in construing a similar trust, that "this designation of beneficiaries is too vague and indefinite to be sustained by the Courts. According to the uniform course of decisions in this State, a trust cannot be upheld unless it be of such a nature that the *cestuis que trust* are defined and capable of enforcing its execution by proceedings in a Court of Chancery. Church Extension of M. E. Church v. Smith, 56 Md. 397."

But while the trust is void, it does not follow that the lessees failed to acquire any title or that there was a resulting trust in favor of the lessors. The lease was not a voluntary conveyance but was made upon a valuable consideration, the payment of the annual rent of \$280. When there is a consideration for the conveyance and it is made upon a trust which is void for uncertainty or otherwise fails, then the grantee takes the beneficial interest. 2 Pomeroy Eq. 1033; Perry on Trusts, sec. 151. A resulting trust will not be raised in opposition to the obvious design of the transaction. Perry on Trusts, sec. 159; Walsh v. McBride *et al.*, 72 Md. 45. In the case now under consideration the trust appears to have been set forth in the lease only to show the purpose for which the property was bought and not to limit the right of alienation. Newbold v. Glenn, 67 Md. 491. The lease consequently is valid and the lessees took the same free from the trust therein set forth. When, therefore, they assigned this property on the 1st of July, 1876, to the Jackson Square Church, by which it had already been improved and used, they conveyed the legal title to the party for whose benefit the lease had been made. This assignment operated to vest both the legal and equitable ownership in the Jackson Square Church, provided the assignment is otherwise free from objection.

Now both the assignment from the original lessees to the Jackson Square Church, and the assignment of that church to the appellant are conveyances of land to "religious societies or denominations," within the Declaration of Rights, Art. 38. While it appears that legislative assent was given to the assignment of the property from the Jackson Square Centenary M. E. Church to the appellants, no such assent appears to have been given to the deed from Alexander Ray *et als.*, trustees, to the Jackson Square Centenary M. E. Church. Even if this be so, we think the legislative sanction on the 7th of April, 1892 (Act of 1892, ch. 430), to the purchase by the appellants from the Jackson Square Centenary M. E. Church, was necessarily a legislative assent to the validity of the grant by Alexander Ray *et als.*, trustees, to the Jackson Square M. E. Church, and a legislative ratification thereof. And this is so, because the subsequent sanction would be nugatory and of no avail, without a ratification of the former grant.

For these reasons, we think the appellant can give a good and valid title to this property, so the *pro forma* decree in this case will be reversed and the cause remanded to the end that proceedings may be had in accordance with this opinion.

*Decree reversed, and cause remanded with costs.*¹

SECTION II.

Where an Express Trust does not Exhaust the Entire Property Transferred to the Trustee.

In re WEST.

GEORGE v. GROSE.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1899.

[1900] 1 Ch. 84.

FURTHER CONSIDERATION. This was the further consideration of an action for the administration of the trusts of the will of Elizabeth Ann West.

By her will, dated February 15, 1887, the testatrix gave, devised, and bequeathed unto W. R. Grose, J. George, R.

¹ Compare Gibson v. Armstrong, 7 B. Mon. (Ky.) 481; Kerlin v. Campbell, 15 Pa. 500; Heiskell v. Trout, 31 W. Va. 810, where the purchase money was paid by a third person. See also *In re Davis*, 112 Fed. 129, *infra* p. 467.

Pengelly, and R. G. Pollard all her moneys and securities for money, plate, linen, china, household goods and furniture, and also her freehold property, consisting of her farms therein named, upon trust that, as soon as conveniently might be after her decease, they sell the same either together or in parcels, and either by public sale or private contract, with full power to buy in and to rescind any contract for sale, and to resell without being responsible for any loss occasioned thereby, and to do and execute all such acts and assurances for effectuating any such sale as they should think fit. And the testatrix declared that the said W. R. Grose, J. George, R. Pengelly, and R. G. Pollard should, out of the moneys to arise from any such sale, pay her funeral and testamentary expenses and debts, and then certain legacies therein specified. And the testatrix gave, devised, and bequeathed unto A. Grose the dwelling-house in which she then resided. And the testatrix declared that her said trustees for the time being of that her will should be chargeable only with such moneys as they respectively should actually receive, and should not be answerable for any moneys they might not receive. And that the trustees might reimburse themselves out of the moneys that should come to their hands under the trusts aforesaid all expenses to be incurred in or about the aforesaid trusts. And the testatrix appointed the said W. R. Grose, J. George, R. Pengelly, and R. G. Pollard executors of that her will.

The testatrix died on February 28, 1896, and her will was proved by the executors other than J. George, who had predeceased her.

The property not being exhausted by the execution of the above trusts, the question arose whether the donees in trust took the surplus beneficially, or whether there were resulting trusts for the co-heirs-at-law and next of kin of the testatrix.

KERKEWICH J. A difficult question arises in this case. The testatrix has given her real and personal property to certain persons as trustees, but the trusts declared do not exhaust the property. The question is what is to be done with the part not required to satisfy the trusts. It is impossible to say that because property is given to persons as trustees they therefore take no beneficial interest. That is contrary to all experience of the construction of wills, there being many instances of trustees taking beneficially. Nevertheless, there is a presumption that a gift in trust is not a beneficial gift. It is, however,

not uncommon to find a gift of a fund charged with certain payments, or coupled with a condition that a certain amount be paid to a third person. Whether the charge takes effect by way of trust or condition, it is not intended to do more than give a certain amount out of the fund to another person. There are numerous cases of that kind.

In *Croome v. Croome* (W. N. (1888) 37, 152; W. N. (1889) 156; 59 L. T. 582; 61 L. T. 814) the Court of Appeal, besides applying the rule in *King v. Denison* (1 V. & B. 260; 12 R. R. 227) to the will before them, took the opportunity of laying down a rule in their own language.

COTTON L. J. says (59 L. T. 584, 585): "I think Mr. Theobald has stated the correct rule to be applied in this case, which is, whether this is a devise for a particular purpose — by which I mean for that particular purpose only — or whether it is a devise subject to certain purposes described as trusts or charges. That, I think, is the rule laid down by Lord Eldon in *King v. Denison* (1 V. & B. 260; 12 R. R. 227). What he says is this: 'If I give to A and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more' — that is to say, exclusively for that purpose — 'and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir.' He means where it is given for the particular purpose only; but where it is given subject to a particular purpose, then what is not required for the purpose of fulfilling that purpose remains to the devisee, it not being imposed on him as a trust or as a charge. It is very true that the charges created by the words of this will do extend till they are satisfied, and charge the whole of the estate, but that, to my mind, is not the question. Now, in construing, we have to see what is the effect of the words — whether they create a devise for a particular purpose only,

or a devise subject to the performance of a particular purpose. I think it is the latter."

BOWEN, L. J., says: "The principle of law seems to me to be laid down by Lord Eldon in what is really classical language, as regards this branch of construction, in *King v. Denison*; and it seems to me that all the cases which have been cited by Mr. Graham Hastings, although, of course, one listens to them with interest and advantage, are only illustrations of the application of what is the undisputed principle. With regard to the language of Lord Cairns in the case of *Williams v. Arkle*, L. R. 7 H. L. 606, I do not think Lord Cairns can have meant to lay down any different principle from that which was laid down by Lord Eldon. If there is any distinction in his language which would seem to sanction any other principle or to crystallise the result of the authorities into something different from that which is to be found in *King v. Denison*, I cannot help thinking that it is due either to some imperfection of the report, or to some most unusual departure by Lord Cairns from his almost invariable lucidity of expression."

And FRY, L. J., says: "There is no controversy as to the principle we are to apply. That principle has been well expressed by Lord Eldon in the passage Cotton, L. J., has read from the report of *King v. Denison*, and the inquiry, therefore, before us is this: Has the testator given the whole legal interest for the purpose of satisfying the trusts he has expressed, or has he not?"

The rule, which is quite intelligible, is also well expressed by STUART, V. C., in *Williams v. Roberts* (27 L. J. (Ch.) 177, 178; 4 Jur. (N. S.) 18), the judgment in the Law Journal giving the pith of the rule, though it is stated at greater length in the Jurist. He says: "The question is, whether the testator has, by his will, made his widow a trustee of the whole or of part only of his personal estate. The language of the will cannot, I think, be construed in any other way than as making her a trustee of that portion of the property only which is given to the legatees other than herself."

That is the pith and marrow of the whole matter. Are the donees in trust trustees in respect of the whole property given, or only in respect of the part that is given to others?

I have now to apply that test to the particular will. There is a general devise and bequest to certain persons on trust for sale. Those words alone do not settle the question, as I

might still find the trustees were intended to take beneficially. The trust for sale is in the ordinary form, and the donees contend that it is mere machinery. But the gift differs considerably from that in *Croome v. Croome* which was in effect a gift subject to a charge. In the present case the trust for sale is quite unnecessary, if the property belongs to the donees beneficially. In that case they could sell as beneficial owners, though whether the purchaser would require the concurrence of their *cestuis que trust* is another matter. They need not sell in that way as they have a trust for sale. But I cannot look on that trust as mere machinery. It affords a strong indication that they are to hold the proceeds as trustees generally. A somewhat finer point arises on the direction that the trustees shall be chargeable only with such moneys as they actually receive. That clause is unnecessary, unless the testatrix contemplated that the donees were trustees of the whole property given. Then follows the reimbursement clause, shewing that the testatrix contemplated that the trustees might require reimbursement of moneys expended in the execution of their trust. The trust for sale and the indemnity and reimbursement clauses hang together, and shew that the testatrix was contemplating a complete trust. This excludes the notion of the trustees taking beneficially, and on the whole I do not think the language of this particular will brings it within the second branch of the rule in *Croome v. Croome*.¹

ROGERS v. ROGERS.

CHANCERY. 1733.

3 P. Wms. 193.

ONE made his will, and thereby gave 5*l.* to his brother, (who was his heir at law) and made and constituted his dearly beloved wife his sole heiress and executrix of all his lands, and real and personal estate, to sell and dispose thereof at her pleasure, and to pay his debts and legacies. The question was, whether the wife was a trustee for the heir at law, as to the surplus of the real estate, after the payment of the testator's debts and legacies?

¹ *Ellicock v. Mapp*, 3 H. L. Cas. 492; *In re Donnelly's Estate*, [1913] 1 I. R. 177, *accord*.

After great debate by counsel on both sides, the LORD CHANCELLOR [KING] decreed, that the testator's wife was intitled to the premises devised, for her own benefit, and that there was no resulting trust to the heir at law of the testator; that the case of *North v. Crompton*, 1 Chan. Rep. 196, was in point; that the devise that the wife should be sole heiress of the real estate, did in every respect place her in the stead of the heir, and not as a trustee for him; that it was the plainer, by reason of the language of tenderness and affection, his dearly beloved wife, which must intend to her something beneficial, and not what would be a trouble only. And what made it still stronger was, that the heir was not forgot, but had a legacy of 5*l.* left him.

Memorandum: On the other side was cited the case of the Countess of Bristol *v.* Hungerford, 2 Vern. 645, where one devised his real estate to be sold for the payment of his debts, and the surplus, if any, to be deemed personal estate, and to go to his executors, to whom he gave 20*l.* a-piece. Decreed the surplus a trust for the heirs at law. But the court thought this a strange determination, and to go much too far.¹

In re BRITISH RED CROSS BALKAN FUND.
BRITISH RED CROSS SOCIETY *v.* JOHNSON.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1914.

[1914] 2 Ch. 419.

ORIGINATING SUMMONS. In October, 1912, the plaintiffs issued an appeal to the public for subscriptions to a special fund for assisting the sick and wounded in the Balkan war.

Large sums amounting to 28,682*l.* were subscribed from time to time and the fund was duly applied by the plaintiffs from time to time during the war. At the end of the war there was an unexpended balance of 12,655*l.* 19*s.* 6*d.* in the plaintiffs' hands which admittedly belonged to some or all of the subscribers by way of resulting trust.

In July, 1913, the plaintiffs circularized the subscribers asking whether the unexpended balance might be devoted to the general purposes of the society. In the result 2310 subscribers of 23,279*l.* consented, 21 subscribers of 295*l.* dissented,

¹ *In re* Howell, [1915] 1 Ch. 241 (reversing *s. c.*, [1914] 2 Ch. 173), *accord.*

and 923 subscribers of 5108*l.* sent no reply. Some of the dissenting subscribers wished their money returned, others that it should be given to some other fund.

The question arose whether the rule in Clayton's Case (1 Mer. 572, 608) was applicable. If so the accounts shewed that the balance in hand must be treated as derived from subscriptions coming in on or after November 8, 1912, and would belong to the subscribers who had subscribed on or after that date, so that they could get their subscriptions back in full if they so desired. On the other hand, if the rule was not applicable, the expenditure would be treated as made rateably out of all the subscriptions irrespective of their date, and the unexpended balance would belong to all the subscribers rateably in proportion to their subscriptions.

On May 22, 1914, the plaintiffs issued this summons to determine this and other points.

Howard Wright, for the plaintiffs. There is no direct authority on the point, but *prima facie* the presumption is that the subscribers gave their subscriptions to the entire fund *en bloc*, which case the unexpended balance would belong to them in rateably as in *In re Abbott Fund Trusts*, [1900] 2 Ch. 326.

Roger Turnbull, for subscribers who had subscribed before November 8, 1912, adopted this argument.

H. O. Danckwerts, for subscribers who had subscribed on or after November 8, 1912. The rule in Clayton's Case, 1 Mer. 572, 608, is applicable.

[ASTBURY, J. That rule applies to an account current kept as a banking account between two parties: *The Mecca*, [1897] A. C. 286, 290. Has it ever been applied to a number of subscribers to a fund?]

There is no reported case on the point. But there is no reason why the rule should not be applied. The subscriptions were paid to the plaintiffs. The plaintiffs paid them into their bank and presumably paid them in as and when received. They had obviously no intention of making any appropriation, so that as between them and the bank the rule in Clayton's Case, 1 Mer. 572, 608, is applicable. That being so it is applicable in favour of third parties — *Deeley v. Lloyds Bank*, [1912] A. C. 756, — and the later subscribers are entitled to claim the benefit of the rule.

ASTBURY, J. The rule in Clayton's Case, 1 Mer. 572, 608, as restated by Lord HALSBURY L.C. in *The Mecca*, [1897] A.

C. 286, 290, is that "where an account current is kept between parties as a banking account, 'there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other.'"

It is a mere rule of evidence and not an invariable rule of law, and the circumstances of any particular case may or may not afford ground for inferring that the transactions of the parties were not intended to come under the general rule.

In the present case the rule is obviously inapplicable. At the outbreak of the Balkan war a public appeal was made for subscriptions for a special fund for assisting the sick and wounded. Subscriptions were obtained and duly applied, and at the close of the war there was an unexpended balance of 12,655*l.* 19*s.* 6*d.* That balance belongs to all the subscribers rateably in proportion to their subscriptions, and subscribers who wish their money returned and are unwilling to leave it for the general purposes of the society are entitled to such proportion of their subscriptions as the total amount unexpended bears to the total amount subscribed.¹

CUNNACK *v.* EDWARDS.

COURT OF APPEAL. 1896.

[1896] 2 Ch. 679.

APPEAL by the Crown from the decision of CHITTY, J. [1895] 1 Ch. 489.

The facts are sufficiently stated in the report of the case in the Court below.

The appeal was heard on November 4, 1895.

¹ *In re* The Trusts of the Abbott Fund, [1900] 2 Ch. 326, *accord.* See *In re* Randell, 38 Ch. D. 213; *In re* Printers, etc., Society, [1899] 2 Ch. 184; *In re* Andrew's Trust, [1905] 2 Ch. 48; *In re* Trusts of Grand Canal, etc., Funds, [1914] 1 I. R. 142; *Hopkins v. Grimshaw*, 165 U. S. 342; *Schwartz v. Duss*, 187 U. S. 8; *Schlessinger v. Mallard*, 70 Cal. 326; *Easterbrooks v. Tillinghast*, 5 Gray (Mass.) 17; *Stone v. Framingham*, 109 Mass. 303; *Daniel v. Jackoway*, Freem. Ch. (Miss.) 59; *Jenkins v. Jenkins University*, 17 Wash. 160; Gray, *Rule against Perpetuities*, 3d ed., secs. 44-51 *a*, 327 *a*, 603 *i*.

On the appeal the defendant Edwards, the legal personal representative of T. H. Edwards, the last surviving ordinary member of the society, abandoned his exclusive claim to the unexpended fund, and he and the other defendant Clarke, who, as is stated in the report in the Court below, had been added as defendant to represent the legal personal representatives of the deceased ordinary members as a body, now appeared by the same counsel.

1896. Aug. 3. LORD HALSBURY, L. C.¹ In the year 1810 a certain number of persons associated themselves together for the purpose of providing for their widows. They were not incorporated, and though they obtained some of the advantages which are involved in incorporation — inasmuch as they came under the protection of the Friendly Societies Acts — I do not think, for the purpose of this inquiry, those facts are important. The question which the Court has to determine would, I think, have remained the same if they had been simply an associated body of persons for the purpose which I have described. The society has lasted to a very recent period, but is now extinct. All the members are dead, but a remnant of the common fund, amounting to something over 1200*l.*, now remains.

CHITTY, J., has held that there is a resulting trust in favour of the personal representatives of those who contributed to the fund. I think we are all of opinion that that view cannot be maintained. The entire beneficial interest has been exhausted in respect of each contributor. It was, as I shall have to repeat in another view of the case, a perfectly business-like arrangement: each man contributed a certain sum of money to a common fund upon the bargain that his widow was to receive, upon terms definitely settled, a certain annuity proportionate to the time during which the husband had contributed to the common fund. There never was and there never could be any interest remaining in the contributor other than the right that his wife, if she survived him, should become entitled to a widow's portion thus provided. This was the final and exhaustive destination of all the sums contributed to the common fund. Under these circumstances, I am at a loss to see what room there is for the contention that there is any resulting trust.

It is contended, however, that this association may be

¹ Concurring opinions of A. L. Smith and Rigby, L. JJ., are omitted.

regarded as a charity. Wide as has been the meaning given to the word "charity" in the Court of Chancery, and, indeed, in one case by the House of Lords, a width of interpretation which I confess has seemed to me in some cases extravagant, I do not think that a perfectly businesslike arrangement like this, in which a number of persons associate together and contribute funds to provide for their own widows, has ever been regarded as charity. I think the observations of HALL, V.-C., in *In re Clark's Trust*, 1 Ch. D. 497, are entitled to great weight. His observations were directed to a society whose members were to provide by subscriptions and fines a fund to be distributed for their mutual benefit in cases of sickness, lameness, or old age. In *Pease v. Pattinson*, 32 Ch. D. 154, and *Spiller v. Maude*, 32 Ch. D. 158, n., it was assumed by the learned judges in those cases, whether rightly or wrongly it is immaterial to consider, that the relief of poverty and suffering formed one of the elements of the associations therein discussed. Here no such question can possibly arise; it cannot be pretended that a wealthy widow would not be entitled to claim her annuity equally with a poor one. If this be a charitable institution it would be difficult to contend that every life insurance company did not fall under the same category.

I am therefore of opinion that this was not a charitable institution. The only other alternative remaining is that which I adopt, namely, that these funds are *bona vacantia*, and belong to the Crown in that character.¹

¹ *Braithwaite v. Attorney General*, [1909] 1 Ch. 510, *accord*.

If a testator leaves no next of kin, a surplus of personal property goes to the Crown. *Read v. Stedman*, 26 Beav. 495; *In re Hudson's Trusts*, 52 L. J. Ch. 789. See also *In re Higginson & Dean*, [1899] 1 Q. B. 325. Similarly, if there is no heir a surplus of real property, or of proceeds arising from the sale of real property, goes under the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71, secs. 4, 7), to the Crown. *In re Wood*, [1896] 2 Ch. 596. Prior to that statute the trustee could keep such surplus.

On the question whether on the death of the *cestui que trust* without heir or next of kin the beneficial interest should go to the settlor or heir or next of kin of the testator, or should pass to the Crown or State or should be retained by the trustee, see Gray, *Rule against Perpetuities*, 3d ed., sec. 205, note.

GLADDING v. YAPP.

CHANCERY. 1820.

5 Madd. 56.

JOHN MONK, by his Will, 15th March 1815, gave to his Kinsman Thomas Harris, all his Messuage and Tenement, Garden and Orchards thereunto adjoining, with the Possession of the Lands he then rented; and also all his Household Furniture, Stock, and Implements of Husbandry, "except one Mare, which I except for the use of Sister Catherine Yapp; and the said Thomas Harris is truly to enjoy the same after my decease, without interruption: the Messuage, Tenement and Lands I give to him and his Heirs for ever; but my Sister Catherine Yapp is to and shall have her free living in the House, or any part for her use, as long as she lives, with the use of any Household Furniture she likes, without any interruption:" and after various other Bequests, the Testator concluded his Will thus: "Now I constitute and appoint my Sister Catherine Yapp to be my sole Executrix, and James Parlour shall have power jointly to call up any Monies due upon Bonds, Notes or any other Securities, to discharge my Funeral Expences and Debts and Legacies, as soon as they shall think meet after my decease, keeping a proper account of the same: and I give unto James Parlour, my Trustee, the sum of 50*l.* for his trouble, to be paid out of my Monies that are due to me at my decease."

The Will was proved by Catherine Yapp. The personal Estate, after payment of all the Debts, Legacies and Funeral Expenses, was very considerable; and the Plaintiffs, as the next of kin, claimed the same as being undisposed of by the Will.

The Defendant, Catherine Yapp, on the 12th June 1817, demurred to the Bill for want of Equity; but the Demurrer was overruled by the Vice-Chancellor, on the 16th January 1818, upon the ground that the direction to keep Accounts *prima facie* imported a Trust.

Afterwards, Catherine Yapp died, and a Bill of Revivor and Supplement was filed against her Executor, Richard Yapp, who submitted, by his Answer, that Catherine Yapp was entitled to the clear residue of the Testator's personal Estate, for her own benefit, and that he was entitled to the

SECTION III.

Where an Intended Trust is not Expressly or is not Properly Declared.

ARMSTRONG, OF THE DEVISE OF NEVE *v.* WOLSEY.

COMMON PLEAS. 1755.

2 Wils. 19.

EJECTMENT, tried at Norwich before Parker, Ch. Baron, who reserved this short case for the opinion of the court. A. B. being in possession of the lands in question, levied a fine *sur conusans de droit come ceo*, etc., with proclamations to the conusee and his heirs, in the 6th year of the present King, without any consideration expressed, and without declaring any use thereof; nor was it proved that the conusee was ever in possession.

So that the single question is, Whether the fine shall enure to the use of the conusor or the conusee? And after two arguments, the Court was unanimous, and gave judgment of the plaintiff, who claimed as heir of the conusor.

CURIA. In the case of a fine *come ceo*, etc., where no uses are declared, whether the conusor be in possession, or the fine be of a reversion, it shall enure to the old uses, and the conusor shall be in of the old use; and although it passes nothing, yet after five years and non-claim it will operate as a bar.

And in the case of a recovery suffered, the same shall enure to the use of him who suffers it, (who is commonly the vouchee,) if no uses be declared; but he gains a new estate to him and

clear, according to the construction in this Court, that upon the face of the Will the legacy appears to be given so that it is not inconsistent with his taking the beneficial interest in the residue, evidence shall not be received to show that he shall not take it."

The doctrine that an executor is presumptively entitled to hold beneficially all property not disposed of in the will never prevailed in the United States; and in England it was provided by statute in 1830 (Executors Act, 11 Geo. IV & 1 Will. IV, c. 40) that the executor "shall be deemed by Courts of Equity to be a trustee for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, the person so appointed executor was intended to take such residue beneficially." It was further provided that this provision shall not apply in cases where the testator leaves no next of kin. See *In re Glukman*, [1908] 1 Ch. 552.

his heirs general; and although before the recovery he was siesed *ex parte maternā*, yet afterwards the estate will descend to his heirs *ex parte paternā*, as was determined in *Martin v. Strachan*, 1 Wils. 2, 66. *Sed vide* that case, 2 Stra. 1179.

In the case at bar, the ancient use was in the conusor at the time of levying the fine; and it seems to have been long settled before this case, that a fine without any consideration, or uses thereof declared, shall enure to the ancient use in whomsoever it was at the time of levying the fine; and as it was here in the conusor at that time, the judgment must be for the plaintiff.¹

JACKSON AND OTHERS v. CLEVELAND AND OTHERS.

SUPREME COURT, MICHIGAN. 1866.

15 Mich. 94.

APPEAL in Chancery from Lenawee Circuit.

This was a bill filed by complainants as heirs at law of Jacob Jackson, deceased, to obtain a reconveyance of certain

¹ RESULTING USES. Before the Statute of Uses a use resulted on a feoffment to the feoffor unless to raise such a use would violate his expressed or presumed intention. No resulting use was raised so far as the use was expressly declared to be in a third person or in the feoffee. No resulting use was raised when to raise it would defeat the presumed intent of the feoffor, as where there was consideration for the feoffment, actual or recited; or where there was tenure between the feoffor and feoffee; or where a part of the use was expressly reserved to the feoffor and to raise a resulting use of the residue would, by the doctrine of merger, give the feoffor a different equitable estate from that reserved. See Leake, Digest of the Law of Property in Land, 2d ed., 83-84.

A use resulted on a conveyance by fine or recovery or grant under the same circumstances as on a conveyance by feoffment; but there is some doubt as to whether a use resulted on a release. See *Shortridge v. Lamplugh*, 2 Ld. Raym. 798; *Lloyd v. Spillet*, 2 Atk. 148; 2 *Sanders, Uses and Trusts* 73.

On the question whether a use resulted on a conveyance by feoffment, fine or recovery after the Statute of Uses, see, in addition to the principal case, *Beckwith's Case*, 2 Rep. 580; *Shortridge v. Lamplugh*, *supra*; *Lloyd v. Spillet*, *supra*.

Before the Statute of Frauds parol evidence was admissible to show the intent to give the beneficial interest to the feoffee or even to a third person (see *Dowman's Case*, 9 Rep. 7 c; *Gilbert, Uses and Trusts*, 54; *Perry, Trusts*, 6th ed., sec. 75); and even after the Statute of Frauds, parol evidence was admissible to show the intent of the feoffor to give the beneficial interest to the feoffee. *Altham v. Anglesey*, Gilb. Rep. 16; *Roe v. Popham*, Doug. 25. See 6 *Columbia Law Review* 329, n. 3.

premises conveyed by said Jackson, in his lifetime, to Joseph H. Cleveland, and by him conveyed to other defendants.

The bill was dismissed, on the hearing.

The facts are stated in the opinion.

CAMPBELL, J. Complainants file their bill as heirs at law of Jacob Jackson, deceased, to obtain a reconveyance of certain lands conveyed by Jackson and wife to Joseph H. Cleveland, and by him subsequently conveyed to defendant, James H. Williams, who gave back a purchase money mortgage which, with the negotiable promissory note accompanying the same, was assigned before maturity to the other defendants, Wheeler & Bros. The bill claims that the deed was made under a separation arrangement between Jackson and his wife, and without any communication with Cleveland, upon the expectation that Cleveland would deal fairly and honorably with him, and follow his directions in regard to disposing of the land; and that it was never actually delivered to Cleveland, but was, some time after its execution, recorded upon the occasion of selling a parcel, which was conveyed by Cleveland, at Jackson's request — the latter, as alleged, receiving the money. It is also claimed that Jackson remained in possession until his death.

Relief was based, by the argument, upon the alleged non-delivery of the deed, and upon the ground that the transaction raised a resulting trust in Jackson, which has descended to his heirs. It is not claimed that any contract was ever made between the parties, and no written declaration of trust is set up.

There is no foundation for the claim that the deed was not delivered. Whether Cleveland or Jackson left it for record is not very material, for it was recorded with their concurrence, and Cleveland assumed to convey the land which was sold at the time of the record, as owner under the deed. The only question involved, so far as he is concerned, arises upon the operation of the deed as involving or not involving a trust in favor of Jackson. The rights of the other defendants rest upon a further claim of being *bona fide* purchasers.

Before considering the legal questions, it may be desirable to understand the facts. It is shown that Jackson and his wife were about separating, and that it was arranged between them, on a sufficient pecuniary consideration, that she should release her dower in her husband's lands. It was, upon con-

sultation, suggested by some person among the counsel, that the property might be deeded to some third person, and Cleveland was fixed upon, and the deed executed without consulting him. Two witnesses are sworn upon this transaction, and it does not appear from their testimony that there was anything said at the time, or subsequently, about what was expected to be the nature of Cleveland's holding. There is no reason to believe that there was any agreement on the subject, and Jackson evidently relied upon Cleveland to do what was to be done, if anything, without making specific terms with him. There is no admission of Cleveland that any one had rights which could be enforced against him, but he has offered to convey the property upon the terms of making provision for an illegitimate child of Jackson's, which the heirs refused to accept.

The case stands upon the simple question whether such a deed, because made without any consideration in fact, involves a resulting trust in favor of the grantor. This deed contains a recital of consideration, and declares the uses in the ordinary form in favor of the grantee, his heirs and assigns in fee. It is in the form which would have been used had the land been bought and paid for, and it is designed upon its face to represent the grantee as an ordinary purchaser. The object, in fact, was to vest in him an indefeasible legal estate, whatever may have been the equities. And the intention to do this was not left subject to revocation, as the recording of the deed was made with an express purpose of having Cleveland enabled to convey, as he did convey to the first person who became a purchaser of a portion of the estate. The equity, therefore, which is relied on in this cause, depends upon the establishment of a principle that a voluntary deed, where no consideration, in fact, passes to the grantor, is subject to a trust in his favor, and no beneficial title vests in the grantee.

This claim is not sustained by any authority. A voluntary deed, which purports to be for the beneficial use of the grantee, and which was made deliberately and without mistake or contrivance, does not differ from any other deed in binding the grantor, and can only be attacked by those having superior equities which the grantor had no right to cut off — as creditors and the like. The only case approaching it is that where an equity is raised against a grantee in favor of the person

who paid the purchase money. This trust is now abolished by our statutes, where the person paying the money has consented to the deed being thus made. And it could always be rebutted by showing that the land was intended to vest beneficially. — *Phillips v. Crammond*, 2 Wash. C. C. R. 441, 445-6; *Benbow v. Townsend*, 1 Mylne & K. 506; *Maddison v. Andrew*, 1 Ves. Sen. 58. And in *Delane v. Delane*, 4 Bro. P. C. 258, it was held that a person paying purchase money, and allowing the deed to be made to another, precluded himself from setting up any such trust by holding such person out as the real owner, and witnessing a lease made by him as such. Upon this principle the action of Jacob Jackson, in procuring Cleveland to deed the parcel sold, would have rebutted such a trust, had this been the case of a purchase by one person in the name of another, and had the statute left such trusts to be enforced. The presumed intention to claim the title is rebutted by acquiescence in the assertion of ownership.

This doctrine of resulting trusts has never been applied to mere voluntary conveyances. Mere want of consideration has never raised resulting trusts out of these. — *Young v. Peachy*, 2 Atk. 256; *Lloyd v. Spillet*, 2 Id. 148; *Leman v. Whitley*, 4 Russ. 423; *Sturtevant v. Sturtevant*, 20 N. Y. 39.

There is a class of cases which were referred to upon the argument, which depend upon the common law rule that a feoffment without consideration, and which declared no uses, created a resulting use to the grantor — or, in other words, was practically no conveyance. But this doctrine has been held to be merely technical at law and in equity, and not at all dependent upon any question of consideration. It rests upon the principles underlying the second great class of resulting trusts, where a trust results in the residue of all estates after the uses or trusts upon which they are conveyed are exhausted. And accordingly, either the mention of a consideration, although nominal, or the declaration of uses, will prevent any trust resulting, and confirm the title in the feoffee. — *Lloyd v. Spillet*, 2 Atk. 148; *Saund. on Uses and Trusts*, 334-5; 2 *Fonblanque's Equity*, 133; 1 *Spence Eq.* 449, 450, 451, and cases cited. A court of chancery has never ventured against the expressed will of the donor, appearing on the face of the deed, to "take the use from the donee, and give it back to the donor. In other words, uses annexed to a perfect gift, however gratuitous, were enforced." — 1 *Spence*, 450.

We have found no authority which would justify us in raising a trust in the present case. Jackson saw fit to leave Cleveland untrammelled by any obligation. Whether he has abused confidence, as there is great reason to believe, or whether he was, as he claims, made a beneficiary to cut off others, is not material.

The other questions need not, therefore, be discussed. The bill was properly dismissed, and the decree should be affirmed, with costs.¹

MARTIN and CHRISTIANCY, JJ., concurred.

COOLEY, J., did not sit in this case.

¹ "In Leake's 'Digest of the Law of Property in Land,' 134, the learned author says: 'Where a conveyance is made without any declaration of trust, and without any payment of purchase-money whence to infer a trust or disposal of the beneficial interest, it is presumed to be made for the benefit of the legal grantee. The rule is different with uses, as has been seen, for absence of consideration and of declared intention raises a resulting use in the grantor. Thus, a grant to A. and his heirs, without any declaration of use and without any consideration to raise a use, imports a resulting use in the grantor, which is executed by the statute, and the estate remains in him as before; but a grant to A. and his heirs to the use of B. and his heirs conveys the legal and equitable interest to B., although there be no consideration given or express appropriation of the beneficial interest, and there is no resulting trust.'

"Mr. Lewin, on the other hand, in his 'Treatise on the Law of Trusts' (7th ed.), 131, makes the following statement: 'If an estate be granted either without consideration or for merely a nominal one, and no trust is declared of any part, then if the conveyance be simply to a *stranger and no intention appear of conferring the beneficial interest*, as the law will not suppose a person to part with property without some inducement thereto, a trust of the *whole estate* (as in the analogous case of uses before the statute of Henry VIII.) will result to the settlor. And if two joint tenants make such a conveyance without consideration, the equitable interest will result to them in joint tenancy.'

"The cases cited by Mr. Lewin hardly warrant his statement. For with three exceptions they are cases of trusts in personal property, of resulting trusts by the payment of purchase-money, or of constructive trusts on the ground of fraud. Furthermore, of the three exceptions, two — namely, *Lady Tyrrell's Case* (1674), Freem. C. C. 304, and *Warman v. Seaman* (1675), Freem. C. C. 308 — were prior to the Statute of Frauds; and in them as well as in the third — *Rex v. Williams*, Bunb. 342 — the decision did not necessarily involve the question of a resulting trust.

"Where personal property is transferred without consideration, whether the transaction is a gift or a transfer upon trust for the transferee depends naturally upon the intention of the transferor, and parol evidence of the intent is of course admissible. But, in the absence of evidence, the presumption of a gift would seem to be a natural one. In *George v. Howard*, 7 Price,

DAVIES *v.* OTTY.

CHANCERY. 1865.

35 Beav. 208.

THIS case, which is reported 33 Beav. 540, on a demurrer, now came on for hearing, but upon allegations of a different state of facts, which the Plaintiff had introduced by amendment. The following statement is founded on the conclusions arrived at by the Court, upon the evidence in the cause.

651, Richards, C. B., said: 'The case of *Rider v. Kidder* [10 Ves. 360] does not apply. That was argued on this ground, that the intestate having purchased the stock with his own money, and transferred it into his own name and that of another person, the presumption is that the other person, if a stranger, is merely a trustee for him whose money it was: and so it might have been presumed here, perhaps, if such were the facts; but in this case stock already purchased and invested was transferred into the name of the owner and the defendant; and if I deliver over money, or transfer stock to another, even although he should be a stranger, it would be *prima facie* a gift.' But in *Freeman v. Tatham*, 5 Hare, 337, Sir James Wigram, V. C., said, referring to the case of *Rider v. Kidder*: 'I do not understand the distinction attempted to be drawn between a transfer and a purchase.' In *Pascoe v. Pascoe*, Sir George Jessel, M. R., said, p. 345, n. 1, that he 'did not understand that the law of this court made any difference between a transfer and a purchase, — a purchase of stock in the joint names of the beneficial owner and another, or a transfer from that beneficial owner in the joint names of himself or herself, or a transfer to a third name from the beneficial owner into another name. In either case, in the absence of evidence to the contrary, there was a resulting trust in favor of the beneficial owner.' See also *Tucker v. Burrow*, 2 H. & M. 526, per Wood, V. C.

"In the same case, on appeal, Sir W. M. JAMES, L. J., said, p. 348: 'I will assume that the implication of a resulting trust does arise as much in the case of a transfer as in that of a purchase of stock, although that is certainly not the case with regard to a conveyance of land.'

"In the following cases it was held, upon the evidence, that there was a gift: *Crabb v. Crabb*, 1 M. & K. 511; *Kilpin v. Kilpin*, 1 M. & K. 520; *Dummer v. Pitcher*, 2 M. & K. 262; *Deacon v. Colquhoun*, 2 Drew. 21; *Batstone v. Salter*, L. R. 19 Eq. 250; L. R. 10 Ch. Ap. 438, s. c.; *Fowkes v. Pascoe*, L. R. 10 Ch. Ap. 343.

"In the following cases it was held, upon the evidence, that the transfer was upon trust for the transferee: *Duke of Norfolk v. Browne*, Prec. Ch. 80; *Hayes v. Kingdome*, 1 Vern. 33; *Sculthorp v. Burgess*, 1 Ves. Jr. 91; *Custance v. Cunningham*, 13 Beav. 363; *Forrest v. Forrest*, 34 L. J. Ch. 428." Ames, *Cases on Trusts*, 1st ed., 262, note. See *Cook v. Fountain*, 3 Swanst. 585; *Duke of Norfolk v. Browne*, Prec. Ch. 80; *Feeney v. Howard*, 79 Cal. 525; *Philbrook v. Delano*, 29 Me. 410; *Lovett v. Taylor*, 54 N. J. Eq. 311; *Down v. Down*, 80 N. J. Eq. 68.

It appeared that, in 1860, the Plaintiff Davies was entitled to three-and-a-half shares in a building society and to a piece of land and some houses, which he had mortgaged to the society, in the usual way in such cases, for securing to the society an advance of money made to him.

By an indenture dated the 17th of January, 1860, made between the Plaintiff Davies of the one part and the Defendant Otty (his step-son) of the other part. This indenture recited the Plaintiff's title, and proceeded as follows:—

"And whereas Matthew Otty has taken from Thomas Davies all his shares in the said benefit building society, and has contracted and agreed with Thomas Davies for the absolute purchase of the said piece of land, messuages," etc. "(subject to the payment by Matthew Otty, his heirs, executors, administrators or assigns, of all the payments which, from the 6th day of January instant, shall become payable for or in respect of the shares in the said society so taken by the said Matthew Otty from the said Thomas Davies as aforesaid) for the sum of 20*l*." It then witnessed, that the Plaintiff, in consideration of 20*l*. paid by the Defendant to the Plaintiff and of the Defendant's covenant, conveyed to the Defendant and his heirs the land and houses, subject to the mortgage and to the payments to the building society. And the Defendant covenanted to make the several payments to the building society, and to indemnify the Plaintiff therefrom.

The circumstances under which this deed was executed appeared to be as follows:—In 1844, the Plaintiff's wife deserted him, and left the place with her paramour. In 1854, the Plaintiff (who had never heard of his wife since her elopement, and believed her to be dead) married a second wife. Five or six years afterwards (1860) the Plaintiff was informed that his first wife was still living, and fearing a prosecution for bigamy, an arrangement was come to, between the Plaintiff and Defendant, that the Plaintiff should transfer the above property until the "difficulty" in which the Plaintiff was had passed over. It was proved by two witnesses that the "distinct understanding" between them was, that the transfer "was to be a nominal one, and was to be done away with when the unpleasantness was over." The Plaintiff afterwards discovered that the lapse of seven years from the time he knew that his first wife was alive protected him against any proceedings for bigamy, and, in 1863, he called on the Defendant to reconvey

the property to him. This the Defendant refused to do, and he claimed it beneficially as his own.

It was proved, that the Plaintiff had, in the meantime, been allowed to remain in possession of the property, and that the Plaintiff had himself made the several payments to the society. The consideration of 20*l.* was not paid in money on the execution of the deed; but the Defendant, who, at that time, held the bill of the Plaintiff for that amount, alleged that the non-payment of this bill was the real consideration. But it was also proved that the amount of this bill had been paid by the Plaintiff to the Defendant since the execution of the deed.

The Defendant denied the trust, and insisted on the Statute of Frauds (29 Car. 2, c. 3), the sections relating to which are as follows:—

Sect. 7. "And be it further enacted, that all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing, signed by the party who is, by law, enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

Sect. 8. "Provided always, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by any act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything hereinbefore contained to the contrary notwithstanding."

Mr. *Baggallay* and Mr. *H. M. Jackson*, for the Plaintiff, argued, first, that the Plaintiff was entitled to a reconveyance, the deed having been executed under a misapprehension and mistake, and also on the express undertaking of the Defendant to reconvey. That there was no illegality in the nature of the transaction to prevent the Plaintiff from obtaining equitable relief, there being no crime in his second marriage after the disappearance for so long a time of the first wife. Secondly, that the 7th section of the Statute of Frauds was inapplicable, there being a part performance and a fraud, and that these were sufficient grounds for taking the case out of the statute, for Courts of Equity never allow the Statute of Frauds to cover a fraud. But that if the case were within the statute,

it came within the 8th section, there being a constructive trust in favour of the Plaintiff, who had never received the alleged purchase-money. They cited *Childers v. Childers*, 3 Kay & J. 310, and 1 De G. & J. 482; *Birch v. Blagrave*, Ambl. 264; *Platermone v. Staple*, Sir G. Coop., 250; *Roberts v. Roberts*, 2 Barn. & Ald. 369; *Cecil v. Butcher*, 2 Jac. & W. 565; *Ward v. Lant*, Prec. Ch. 182; *Dale v. Hamilton*, 5 Hare, 369; *Lincoln v. Wright*, 4 De G. & J. 16; Statute of Frauds (29 Car. 2, c. 8); 24 & 25 Vict. c. 100, s. 57.

Mr. *Hobhouse* and Mr. *W. W. Cooper* for the Defendant. The evidence and the nature of the transaction shew that an absolute conveyance was contemplated and was essential for the object, and the alleged agreement is expressly denied by the Defendant. The case is one intended to be met by the statute, the 7th section of which is express: — that all creations of trusts shall be in writing or else be utterly void. No parol evidence is, therefore, admissible of such a trust. There is no constructive trust or part performance. If the denial of a parol trust is to be considered a fraud, this section of the statute would be inoperative, the object of it being to prevent perjury by excluding parol evidence, and by not allowing a trust of land to be proved by anything but by some writing. They cited *Brackenbury v. Brackenbury*, 2 Jac. & W. 391; *Curtis v. Perry*, 6 Ves. 739; *Lindsay v. Lynch*, 2 Sch. & Lif. 1; *Kendall v. Beckett*, 2 Russ. & M. 88; *Wright v. Wilkin*, 4 De G. & J. 141; *Gascoigne v. Thwing*, 1 Vern. 366; *Groves v. Groves*, 3 Y. & Jer. 163; Statute of Frauds (29 Car. 2, c. 3, s. 4); *Bartlett v. Pickersgill*, 1 Cox, 15, and 1 Eden, 515; *Lord Irnham v. Child*, 1 Bro. C. C. 92; *Cawley v. Poole*, 1 Hem. & Mil. 50.

Mr. *Baggallay* in reply.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY]. Upon considering this case, and looking at the various authorities on the subject, and after referring again to the evidence, I am of opinion that the Statute of Frauds can have no application to this case.

Assuming (which I do for the present) that there was nothing whatever illegal in the transaction (the existence of which would, of course, alter the case), I consider it is proved, by the evidence, that the Plaintiff, apparently in a difficulty, or afraid of getting into one, transferred this property to the Defendant, who thereupon agreed that he would retransfer

it to the Plaintiff when required; but when the time for the retransfer arrived, the Defendant refused to re-transfer it. Such being the facts, I am of opinion that it is not a case to which the Statute of Frauds applies. There was no consideration paid by the Defendant, the 20*l.* mentioned in the deed never having been paid; for the Plaintiff's bill of exchange held by the Defendant, and which he states to be the consideration for the deed, appears, by the evidence, to have been afterwards repaid by the Plaintiff by instalments in various sums. This being so, I am of opinion that "it is not honest to keep the land." If so, this is a case in which, in my opinion, the Statute of Frauds does not apply. I think that the subsequent course of dealing confirms this view; for the Plaintiff has ever since been allowed to remain in possession of the property, and he has paid all the instalments to the benefit building society. In my opinion, therefore, this case comes within the 8th section of the Statute of Frauds, and is excepted from the operation of the prior section. Therefore, the case is not such as entitles the Defendant to set up the Statute of Frauds as a ground for allowing him to retain the property.

I am also clearly of opinion there was no illegality in the transaction, and that the Plaintiff was quite justified, morally and legally, in marrying the second wife, although the effect of it may have been, that she did not become his wife. The long absence of his first wife was sufficient to justify the Plaintiff in coming to the conclusion that she was dead, and would have induced this Court to have come to the same conclusion, and, possibly, to have acted on it, by paying money out of Court on that footing. That being so, I am of opinion that the Plaintiff is entitled to a degree.

The costs of the conveyance were paid for by the Defendant, and I am of opinion that the Plaintiff ought to repay them; and, upon the Plaintiff's undertaking to repay them, I shall order a reconveyance at the expense of the Plaintiff. Cancelling the deed would not be sufficient, unless it was originally void, and I do not think it was. The Plaintiff must have his costs of suit.¹

¹ *Haigh v. Kaye*, L. R. 7 Ch. 469; *In re Duke of Marlborough*, [1894] 2 Ch. 133; *Clarke v. Eby*, 13 Grant Ch. (U. C.) 371; *Breitenstein v. Munson*, 19 Brit. Col. R. 495; *Schuerman v. Schuerman*, 7 Alberta, 380; *Peacock v. Nelson*, 50 Mo. 256 (*semble*), *accord*. See also *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196.

As to the effect of the illegality of the purpose for which the property is

TITCOMB AND OTHERS v. MORRILL AND OTHERS.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1865.

10 Allen 15.

CHAPMAN, J. The bill alleges that the female plaintiffs are the children and sole heirs of David Morrill, deceased; that in the year 1839 said David made a quitclaim deed of the house and land described in the bill to Timothy P. Morrill, his brother; that there was no valuable consideration paid for said deed; that the land was conveyed in trust, for the benefit of said David and his heirs, on account of his intemperate habits at that time, said David having been prevailed upon to make such conveyance partly by promises and partly by threats. The bill then states the value of the property, the occupation of it by David during his lifetime, and by his heirs since his death, without payment of rent; that it was not the intention of said Timothy P. to avail himself of his legal title against said David or his heirs; and that he held it and meant to hold it in trust for their benefit. It then alleges the pendency of an action at law by the defendants to recover possession of the property, and prays for an injunction against the prosecution of the action at law, and a decree that the defendants shall give up and renounce the trust, and convey the premises to the plaintiffs; that an account may be stated between the parties, with an offer to pay whatever may be due from the plaintiffs, and concludes with a prayer for general relief.

The defendants' answer denies the trust, the want of consideration and the threats, and claims an absolute title under the deed to Morrill, their ancestor; and under the 28th rule, authorizing a defendant in his answer to insist on any special matter and have the same benefit as if he had pleaded or demurred to the bill, it states as special matter: 1. That the bill is founded upon an alleged trust, and the trust is not stated or described with such distinctness that the court can ascertain it or enforce it; 2. That the trust is not alleged to arise or result by implication of law, nor to have been created or declared by any instrument in writing signed by the party declaring or creating the same, as required by the statute;

transferred, see *Doughty v. Miller*, 50 N. J. Eq. 529; *Haigh v. Kaye*, *supra*; and see *supra*, p. 366.

3. They plead the statute of frauds in bar, and allege that the trust was not created or declared by any instrument in writing.

In a plea in bar subsequently filed, they allege that judgment has been recovered by them against the plaintiffs in the action at law. But it is not material to consider the validity or propriety of this plea.

The bill alleges a trust concerning lands. By Gen. Sts. c. 100, sec. 19, "no trust concerning lands, except such as may arise or result by implication of law, shall be created or declared, unless by an instrument in writing signed by the party creating or declaring the same, or his attorney." This is different from the English statute, which does not require the trust to be declared in writing, but only manifested and proved in writing. It is not necessary in this case to decide whether this difference of phraseology is material. Nor is it necessary to decide whether a bill brought to enforce an express trust concerning lands must aver that it was created or declared in writing. The authorities on that point are somewhat conflicting. If it had been intended by the plaintiffs' solicitor that the bill should allege an express trust, it would be defective on another ground. By Rule 4, it is required that the bill shall contain a clear and explicit statement of the plaintiffs' case. This bill does not contain a clear and explicit statement of an express trust. But though its language is loose and general, it is apparently intended to contain a statement of an implied trust. It alleges that the deed of conveyance was a quitclaim, which without further description implies an absolute and unconditional deed. It does not set forth any agreement of the grantee. The promises connected with the threats of which it speaks must be understood as verbal and general, and not as constituting an express trust. The prayer for a decree that the defendants shall give up and renounce the trust and convey the land to the plaintiffs seems to regard it as a trust arising or resulting by implication of law. The plaintiffs' counsel has argued the case upon the ground that the bill sets forth such a trust, and has not contended that there was an express trust within the statute.

Regarding the bill, then, as setting forth a trust arising or resulting by implication of law, the plaintiffs' position is, that the conveyance without consideration, aided perhaps by a parol agreement, raises a trust by implication of law in favor of the grantor such as this court can enforce. No authority is pro-

duced to sustain this position; and the case of *Bartlett v. Bartlett*, 14 Gray, 278, is a recent authority to the contrary. It is unlike the cases referred to in *Adams on Equity*, cited by the plaintiffs' counsel. The most numerous class of these cases is where a purchase is made in the name of one person, and the purchase money is paid by another. None of these are cases where a grantor has been held to be *cestui que trust* on the ground that the consideration was not paid, or that there was a parol understanding that the grantee should hold the land in trust for him.

*Demurrer sustained; bill dismissed with costs.*¹

GREGORY *et al.*, APPELLANTS, *v.* BOWLSBY *et al.*,
APPELLEES.

SUPREME COURT, IOWA. 1902.

115 Iowa 327.²

SUIT in equity for the cancellation of a deed made by plaintiffs to defendant, and to declare and enforce a trust in certain real estate. The trial court sustained a demurrer to the petition as amended, and plaintiffs appeal. — *Reversed*.

¹ For numerous cases in accord with the principal case, see 6 *Columbia Law Review* 326; 20 *Harvard Law Review* 549; 12 *Michigan Law Review* 423, 515; 39 *L. R. A.* (N. S.) 906.

In Massachusetts the grantor, although he cannot reach the land conveyed, may recover its value in an action at law. *Twomey v. Crowley*, 137 Mass. 184; *O'Grady v. O'Grady*, 162 Mass. 290; *Cromwell v. Norton*, 193 Mass. 291. But see *Sturtevant v. Sturtevant*, 20 N. Y. 39.

If land is conveyed to one who orally agrees but later refuses to give other land in exchange therefor, it has been held that the land conveyed may be recovered. *Jarboe v. Severin*, 85 Ind. 496; *Ramey v. Slone*, 23 Ky. L. Rep. 301; *Dickerson v. Mays*, 60 Miss. 388. See further Keener, *Quasi-Contracts*, pp. 277 *et seq.*, Woodward, *Quasi Contracts*, sec. 95.

If a deed, absolute in form, is intended merely as a security, the Statute of Frauds does not preclude redemption. *Linkemann v. Knepper*, 226 Ill. 473; *Campbell v. Dearborn*, 109 Mass. 130; Wyman, *Cases on Mortgages*, rev. ed., pp. 60 *et seq.*

As to the effect of part performance, see *Feeney v. Howard*, 79 Cal. 525; *Hayden v. Denslow*, 27 Conn. 335; *Verzier v. Convard*, 75 Conn. 1; *McCartney v. Fletcher*, 11 App. D. C. 1; *Gallagher v. Northrup*, 215 Ill. 563; *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 98; *McKinley v. Hessen*, 202 N. Y. 24; *Jeremiah v. Pitcher*, 26 N. Y. App. Div. 402, affirmed 163 N. Y. 574; *Spaulding v. Collins*, 51 Wash. 488.

² For the same case on a subsequent appeal, see 126 Iowa 588.

DEEMER, J. It appears from the amended and substituted petition, which, under the record, must be treated as presenting the facts, that plaintiffs are the children and heirs at law of defendant Benjamin Bowsby and of Catherine S. Bowsby, now deceased, and that the defendant M. J. Bowsby is the second wife of her co-defendant; that Catherine S. Bowsby died intestate, seised of the real estate in dispute; that at the request of defendant Benjamin Bowsby certain of the plaintiffs met the father at the home of Frank Davidson, a son-in-law, and that the father then and there requested them to deed to him their interest in the real estate left by his deceased wife, in order that he might use and farm the land to better advantage, and that he then and there verbally agreed that he would hold the land, would not sell or dispose of the same, and that the net proceeds and accumulations thereof should and would at his death descend to the children of Catherine Bowsby, as provided by law; that, believing in said promises, and that such an arrangement was valid, they executed a deed of bargain and sale to their father of their interest in the real estate theretofore owned by their mother, which deed recited a consideration of \$1, the receipt whereof was acknowledged by the grantors; that by reason of the relations existing between them and their father these plaintiffs accepted his statements and promises without taking legal advice, and relied on him to advise them as to their rights and protect them in the premises; that neither defendant nor his attorney, who was present with him, advised them that the arrangement could not be enforced. It further appears from the allegations of this petition that the conveyance was procured by mistake on the part of these plaintiffs, induced by the representations made to them by said defendant; that said defendant paid nothing for the conveyance, and that the sole consideration therefor was his agreement as aforesaid. It is further alleged that said defendant did not intend to carry out the arrangement or agreement on his part, but made the representations and agreement aforesaid for the sole purpose of cheating and defrauding plaintiffs out of their interest in the land of their deceased mother; that after his marriage to his co-defendant he conveyed to her an undivided one-third interest in the property received from plaintiffs, but that this conveyance was without consideration, and was made with the intent to cheat and defraud these plaintiffs;

that his co-defendant, when she took the conveyance, knew of the terms and conditions under which her husband received his deed from these plaintiffs. The prayer is that these deeds be canceled, that plaintiffs be adjudged to be the owners of an interest in the property, that their title be quieted, and that an accounting be had of the rents and profits of the real estate. The demurrer was the general equitable one, and as further grounds therefor it is claimed that the alleged oral agreement is within the statute of frauds.

It will be observed from this statement that the deed from plaintiffs to defendant was absolute on its face, and recited a consideration, the receipt whereof was acknowledged by the grantors; and that the agreement on which plaintiffs rely was in parol. The conveyance was directly from these plaintiffs to the defendant Benjamin Bowlsby, their father; hence the doctrine of resulting trust does not apply. That plaintiffs, in the first instance, are seeking to establish an express trust is too clear for argument; and it is equally clear that such a trust cannot rest in parol. Code, sections 2918, 4625; *Ratliff v. Ellis*, 2 Iowa, 59; *McGinness v. Barton*, 71 Iowa, 644; *Hain v. Robinson*, 72 Iowa, 735; *Dunn v. Zwilling*, 94 Iowa, 233; *Maroney v. Maroney*, 97 Iowa, 711; *Hemstreet v. Wheeler*, 100 Iowa, 290; *Acker v. Priest*, 92 Iowa, 610. We need not quote from these cases in support of the rule announced. They fully cover the ground, and need no amplification. That there was no resulting trust clearly appears from the opinion in *Acker v. Priest*, *supra*. See, also, *McClain v. McClain*, 57 Iowa, 167, which is directly in point. As the deed was absolute on its face, and recited the payment of a valuable consideration, plaintiffs will not be permitted to establish a trust by showing that there was in fact no consideration but a parol agreement to hold the title in trust. *Acker v. Priest*, *supra*, and cases cited at page 617, 92 Iowa.

As an express trust cannot be shown by parol, and as there was no resulting trust, we have one question left, and that is, was there such a fraud perpetrated by defendant Benjamin Bowlsby as entitled plaintiffs to the relief asked? That relief is not a reformation of the contract, but its cancellation; not a judgment at law as for fraud, but a decree quieting title, and for an accounting. If there is any cause of action stated, it is for the declaration and establishment of a constructive trust, growing out of the alleged fraud of the defendants. While

some facts are recited for the purpose of showing fiduciary relations between the parties, we apprehend they are insufficient for that purpose. A father bears no such confidential or fiduciary relations to his adult children as to bring transactions between them relating to the land of either under suspicion. He may deal with them as with strangers, and no presumption of fraud or undue influence obtains. It is charged, however, that, with intent to cheat and defraud, defendant made the representations charged, fully intending at the time he made them not to carry them out, but to obtain the title to the land, and thus defraud the grantors. Does this make such a case of fraud as that a court will declare a constructive trust in the land in favor of the grantors? The instrument was in the exact form agreed upon by the parties, and there was no promise to execute defeasances or other instruments to witness the trust. The sole claim is that defendant made the promises and agreements with intent to cheat and defraud the plaintiffs. Mere denial that there was a parol agreement as claimed will not constitute a fraud. *Acker v. Priest and McClain v. McClain, supra*. If it did, the statute would be useless. Nor will a refusal to perform the contract be sufficient to create a constructive trust. *McClain v. McClain, Dunn v. Zwilling, supra*. But the statute was not enacted as a means for perpetrating a fraud; and, if fraud in the original transaction is clearly shown, the grantor will be held to be a trustee *ex maleficio*. If, then, there was a fraudulent intent in procuring the deed without intention to hold the land as agreed, and pursuant to that intent the grantee disposed of the property, or otherwise repudiated his agreement, equity will take from the wrongdoer the fruit of his deceit by declaring a constructive trust. *Acker v. Priest, supra*, and cases cited. Mere breach or denial of the oral agreement does not, as we have said, constitute a fraud. "It seems to be requisite," says Chief Justice GIBSON in *Hoge v. Hoge*, 1 Watts, 163 (26 Am. Dec. 52), "that there should have been an agency, active or passive, on the part of the grantee, in procuring the deed." Or, as said by Mr. Pomeroy, in his work on Equity Jurisprudence (section 1055); "There must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated." Breach of the agreement may, of course, be considered, but it is not alone sufficient. There must be also some clear and explicit

evidence of fraud or imposition at the time of the making of the conveyance to constitute the purchaser a trustee *ex maleficio*. The instant case, however, does not present the question of the quantity of proof required, for, as has been stated, it was decided upon demurrer to the petition, which pleads fraud in the inception of the transaction, and specifically alleges that the deed was made through defendant's agency, and upon his promise and representations, with the specific intent to cheat and defraud. Our observations regarding the character of the evidence required will perhaps prevent misapprehension of the rule in the future. The authorities are not harmonious on the questions discussed, although the points of difference seem to relate more to the *quantum* of proof in addition to the mere breach of promise than to the rule itself. We cite in this connection: *Patton v. Beecher*, 62 Ala. 579; *Wheeler v. Reynolds*, 66 N. Y. 227; *Glass v. Hulbert*, 102 Mass. 24 (3 Am. Rep. 418); *Morrall v. Waterson*, 7 Kan. 199; *Fairchild v. Rasdall*, 9 Wis. 379; *Johnson v. Hubbell*, 10 N. J. Eq. 332 (66 Am. Dec. 773); *Brison v. Brison*, 75 Cal. 525 (17 Pac. Rep. 689, 7 Am. St. Rep. 189); *Pomeroy*, Equity Jurisprudence, sections 1055, 1056. This seems to be the first time the question has arisen in this court, although the rule announced has been recognized in the *Acker and McClain Cases*, *supra*, and in *Burden v. Sheridan*, 36 Iowa, 125.

We think the petition on its face recites facts showing a constructive trust, and that the demurrer should have been overruled.

*Reversed.*¹

CATALANI *et al.* v. CATALANI.

SUPREME COURT, INDIANA. 1890.

124 Ind. 54.

OLDS, J. This action was brought by the appellee against Mary Catalani and Nicoli Catalani, appellants. The complaint is in two paragraphs. The first paragraph seeks to recover \$2000, the purchase-money for certain real estate conveyed by the appellee to the appellant Mary Catalani. The second paragraph seeks a reconveyance of certain real estate, situate in Marion county, and conveyed by appellee to the appellant Mary Catalani. The appellants demurred

¹ See *Henschel v. Mamero*, 120 Ill. 660; *Brown v. Doane*, 86 Ga. 32.

to each paragraph of the complaint, which demurrer was overruled, and exceptions reserved. Issues were joined and a trial had, resulting in a finding and judgment in favor of the appellee for the recovery of the real estate.

Appellants filed a motion for a new trial, which was overruled, and exceptions reserved.

Errors are assigned on the rulings of the court in overruling the demurrer to the complaint, and in overruling the motion for a new trial.

The principal question is presented by the ruling of the court in overruling the demurrer to the second paragraph of the complaint. The second paragraph of the complaint is in substance as follows: It is alleged that on the 2d day of July, 1886, the appellee was the widow of one Michael Pantone; that upon the death of her husband there descended to her, as such widow, certain real estate, which is described; that on said 2d day of July, 1886, she contemplated marriage with one Frank Catalani, and that in order to relieve said real estate from the operation of the statute prohibiting her from selling, conveying, mortgaging, or incumbering the same in any way during her second marriage, it was agreed between said appellant Mary Catalani, and appellee, that the appellee should convey said real estate to said Mary Catalani, to be held by said Mary for the use and benefit of the appellee until the appellee should consummate her said contemplated marriage by having the marriage ceremony with the said Frank Catalani performed in due form of law, and upon said marriage taking place the said Mary Catalani and her husband, said Nicoli Catalani, who also assented to said arrangement, agreed to reconvey said real estate back to and vest the title to the same in the appellee; that the present husband of the appellee, said Frank Catalani, is a brother of the said Nicoli Catalani, and said Frank had lived in the family of the said Mary and Nicoli as a member thereof, and that the relations of the said appellee and the appellants and said Frank Catalani were, at and before the time of said conveyance, of a very intimate and confidential character, and the appellee was induced by her present husband and the appellants to believe that she could safely vest the title to the said real estate in said Mary Catalani, and that she would, in good faith, hold said title for, and reconvey the same back to her as soon as she and said Frank were married; that she in good

faith relied upon the integrity and good faith of said Mary, and conveyed said real estate to her as aforesaid; that within a few days after said conveyance the appellee was duly and legally married to said Frank Catalani; and after her said marriage she requested said Mary to reconvey said real estate to her by quitclaim deed, as she had solemnly agreed to do; but said Mary, intending to cheat and defraud this appellee out of said real estate, and to hold the same for her own use and benefit, absolutely refused to convey the same to her; and, though often requested so to do, still refuses to reconvey the same. Prayer for reconveyance, etc.

It is contended by counsel for appellants that the conveyance is a valid one, and that the paragraph of complaint seeks to show by parol that a deed, absolute upon its face, was made upon the agreement of the grantee to hold the land in trust, and reconvey it to the grantor at a future time upon the happening of a contingency, and that this cannot be done; that such an agreement is within the statute of frauds and cannot be proven by parol.

By the demurrer the appellants admit the facts alleged in this paragraph, which show that the appellant Mary received the conveyance and title to the land without any consideration whatever; that by virtue of the intimate and confidential relations existing between the parties the appellants were enabled to induce, and did by their promises induce, the appellee to rely upon their good faith and honesty and convey the land to said Mary upon an agreement that she would reconvey the same, upon her marriage; and that she now, with the intent to cheat and defraud the appellee out of the land, and retain the same for her own use, refuses to reconvey the same as she agreed. If, under these circumstances, the appellee was prevented by the statute of frauds from recovering the land, the statute would operate to enable, and be the means of enabling, the appellant Mary to perpetrate a fraud upon the appellee, and it has been repeatedly held that this is not the purpose of the statute of frauds, and that the statute will not be permitted to aid in the perpetration of a fraud. Thus, in the case of *Tinkler v. Swaynie*, 71 Ind. 562, it was said by the court: "It has often been held that the statute of frauds shall not be made an instrument of fraud."

Davies v. Otty, 35 Beavan, 208, is a case where the plaintiff's wife deserted him, in 1844, and left with her paramour.

In 1854 the plaintiff, not having heard of his wife since her departure, believed her to be dead, and married a second wife. In 1860 plaintiff was informed that his first wife was still living, and fearing prosecution for bigamy he made an arrangement with the defendant that the plaintiff should transfer his land to the defendant, which he did, the defendant to hold the same until after he was through with his difficulty, and then to reconvey the same. Plaintiff afterwards learned that the prosecution for bigamy was barred by limitation, and called upon the defendant to reconvey the land to him and the defendant refused, and claimed the land as his own. It was held that the statute of frauds did not apply, and that the plaintiff was entitled to recover. The court, in that case, after stating the facts, say: "This being so, I am of opinion that 'it is not honest to keep the land.' If so, this is a case in which, in my opinion, the statute of frauds does not apply."

In *Damschroeder v. Thias*, 51 Mo. 100, it is held that where one acquires title to land by fraud, and by fraud induces the owner to convey to him or acknowledge his title, a court of equity will declare him a trustee for the owner, and that he cannot, in such case, invoke the statute of frauds and claim that agreements by which the title was obtained were verbal, and, therefore, void under the statute of frauds, and that the statute of frauds was never intended for the protection of fraud. While this decision probably goes too far, yet we cite it as showing that some courts go farther in the admission of parol evidence than it is necessary to do in this case in order to sustain the complaint.

In 1 *Perry Trusts*, section 226, it is said: "The statute of frauds is no obstacle in the way of proof of an actual or constructive fraud in the sale of property. Parol evidence is admissible to establish a trust, even against a deed absolute on its face, if it would be a fraud to set up the form of the deed as conclusive." It is further said: "But where a conveyance in trust is made voluntarily, without solicitation or undue influence, a mere promise to hold in trust is within the statute."

But the facts alleged in this case show that the parties bore a peculiar and confidential relation to each other, and that the appellee was solicited, prevailed upon, influenced, and induced by the appellants to make the conveyance, and it would operate as a fraud to permit the form of the deed to be set up as a defence to the action.

This court has recognized this same doctrine in a number of cases. In *Cox v. Arnsmann*, 76 Ind. 210, numerous authorities are cited and quoted from, recognizing the doctrine that where it would operate as a fraud to allow the grantee to rely upon his deed, absolute upon its face, parol evidence will be admitted to prove the facts establishing a trust. Also, in the cases of *Teague v. Fowler*, 56 Ind. 569; *Jackson v. Myers*, 120 Ind. 504; *McDonald v. McDonald*, 24 Ind. 68.

We are of the opinion that the second paragraph stated a good cause of action, and that the demurrer thereto was properly overruled.

The question presented by the overruling of the motion for a new trial is as to the sufficiency of the evidence, and presents substantially the same question as the one presented by the demurrer to the complaint. The evidence supports the finding.

There is no error in the record.

*Judgment affirmed, with costs.*¹

TILLMAN *et al.* v. KIFER *et al.*

SUPREME COURT, ALABAMA. 1910.

166 Ala. 403.

SAYRE, J. In 1891 Robert J. Tillman, being on the eve of a failure in business and a general assignment for the benefit of his creditors, made a deed to his sister, Mrs. Lucy E. Kifer, of certain lots in Tillman's addition to the city of Bessemer on a recited consideration of \$600. Now this bill is filed by the children of Robert J., averring that the lots were conveyed on the trust and confidence that the grantee would hold them for complainants, and would at a later time execute a deed to the alleged beneficial owners. There is no semblance of trust shown on the face of the deed. No facts are alleged, as that the consideration, or any part of it, moved from the complainants, with an understanding that the beneficial ownership was to be in them, from which a trust would result by operation of law, without express words of creation. Nor is there averment of undue influence arising out of confidential relation, or other circumstances of fraud between the parties, to con-

¹ *Jones v. Jones*, 140 Cal. 587; *Miller v. Miller*, 286 Ill. 522; *Wood v. Rabe*, 96 N. Y. 414; *Cardiff v. Marquis*, 17 N. D. 110, *accord*.

stitute the grantee a trustee *ex maleficio*, as was the case in *Kyle v. Perdue*, 95 Ala. 579, 10 South. 103, and *Noble v. Moses*, 81 Ala. 530, 1 South. 217, 60 Am. Rep. 175, cited by appellants. The bill shows nothing more than an effort to enforce a trust according to the alleged agreement of the parties to the deed; that agreement having been expressed by parol, and not otherwise. The defendants have denied the agreement, have averred that the transaction was of a character entirely different from that set up in the bill, and it may be said that the weight of the evidence is with them.

But, apart from defendants' version, the case made by the bill, and sustained by complainants' theory of the proof, must fall under the condemnation of the statute which provides that no trust concerning lands, except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law, can be created, unless by instrument in writing, signed by the party creating or declaring the same. — Code, sec. 3412. All questions in this case were settled in *Patton v. Beecher*, 62 Ala. 579, to which nothing can be added. *McCarty v. McCarty*, 74 Ala. 552, and *Cresswell v. Jones*, 68 Ala. 420, cited by appellants, were cases in which the trusts involved were expressed in writing.

The decree of the court below must be affirmed.

Affirmed.

DOWDELL, C. J., and SIMPSON and MCCLELLAN, JJ., concur.¹

FISCHBECK v. GROSS.

SUPREME COURT, ILLINOIS. 1884.

112 Ill. 208.

APPEAL from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

Frances A. Gross, suing in her own right, and as executrix of the estate of William H. Gross, deceased, exhibited her bill in chancery in the court below, against Frederick Fischbeck, for the purpose of having a trust declared in her favor in respect of certain premises for which the defendant held

¹ *Lantry v. Lantry*, 51 Ill. 458; *Ryder v. Ryder*, 244 Ill. 297; *Willis v. Robertson*, 121 Iowa 380; *Perkins v. Perkins*, 181 Mass. 401; *Salter v. Bird*, 103 Pa. 436, *accord*. But see *Peacock v. Nelson*, 50 Mo. 256, 261.

the legal title. Upon the hearing, the court decreed in favor of the complainant. The defendant appealed.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by Frances A. Gross, in the circuit court of Cook county, against Frederick Fischbeck, to establish a trust in certain premises in Chicago in favor of complainant, and to compel a conveyance thereof to her. The defence relied upon was of a three-fold character: First, that no trust was created; second, the Statute of Frauds; and third, that the conveyance from Gross to him was made with the intent to hinder and delay the creditors of Gross.

Many of the facts in reference to the transaction in controversy are undisputed, among which are the following: That Charles V. Gross, the husband of complainant, in July, 1877, was the owner in fee of the undivided five-sixteenths of the lots in question, subject to a mortgage in favor of the Connecticut Mutual Life Insurance Company, amounting to some \$4000; that on or about July 30, 1877, Charles V. Gross conveyed the premises to appellant; that appellant paid no consideration whatever for the conveyance. Nothing, however, appears on the face of the deed made to appellant, indicating the character or object of the conveyance; but the parol evidence and letters prove, beyond controversy, that the land was deeded to appellant to hold for the benefit of appellee. In June, 1877, Charles V. Gross, who then resided at St. Joseph, Missouri, went to Chicago to consult with appellant in regard to conveying the property to his wife. At the suggestion of appellant they called upon the attorneys of the latter in Chicago, and after a consultation the attorneys were directed to prepare a deed conveying the property to appellee, which was to be forwarded to Gross, at St. Joseph, Missouri, for execution. Gross returned to Missouri, and appellant, after Gross had left, caused a deed to be prepared by his attorneys, conveying the property to himself, instead of to appellee, and the deed, thus prepared, was sent to St. Joseph, Missouri, to be executed. The following letter was sent by the attorneys with the deed:

“CHICAGO, *July 30, 1877.*

“Charles V. Gross — In compliance with your request, we have made a transfer of your interest in the estate of John L. Gross. We drew the deed to Mr. Fischbeck, instead of

your wife, in order to avoid any suspicion that the transfer was made to avoid creditors. Mr. Fischbeck will quitclaim it back to you for your own protection; but this last deed must not be recorded. It will be good as between you without recording. Sign the enclosed deed, acknowledge the same before a notary public, and get a certificate of magistracy, and return at once for recording. Enclosed please find bill for our services and cost of recording."

Appellant also wrote Gross a letter, as follows:

"CHICAGO, *July 30, 1877.*

"Dear Charles — The papers are made out and sent to you. You can have them signed over to Fanny, or you may leave it as it is fixed. I will do in your favor the best I can. I think it is better you leave it for a while in my hands. The lawyer thought it was better, too."

After the receipt of these letters the deed was executed, and returned to Chicago, and placed upon record.

It is apparent from the evidence that Charles V. Gross intended to convey the property directly to his wife. The attorneys were directed to prepare the deed conveying the property to her, and the only logical conclusion that can be reached from all the evidence is, that the conveyance would have been made directly to her had not appellant interposed, and ordered and directed that the conveyance should be made to himself, with the understanding that he would hold the property in trust for appellee. If our view of the evidence is the correct one, it is plain that the case is one, in its facts, which falls directly within the rule announced in *Lantry v. Lantry*, 51 Ill. 458. In the case cited, where the facts are quite similar to the facts in this case, it is said: "If A voluntarily conveys lands to B, the latter having taken no measures to procure the conveyance, but accepting it, and verbally promising to hold the property in trust for C, the case falls within the statute, and chancery will not enforce the parol promise. But if A was intending to convey the land directly to C, and B interfered, and advised A not to convey directly to C, but to convey to him, promising, if A would do so, he, B, would hold the land in trust for C, chancery will lend its aid to enforce the trust, upon the ground that B obtained the title by fraud and imposition upon A." See, also, *Pomeroy's Equity*, sec. 1055; *Beegle v. Wentz*, 56 Pa. St. 399.

Gross, in his evidence, testified that he ordered the attorneys whom he engaged to prepare the deed, to make it to his wife, and he left the attorneys' office with the understanding that the deed was to be made conveying the property to her. In this he is not contradicted by appellant or the attorneys, all of whom were present when the direction was given to make out the deed. The letters written by the attorneys and appellant corroborate Gross upon this point, so that there is no doubt as to the fact. It is also equally plain, from the evidence, that the deed would have been made to appellee, as originally directed, had not appellant interfered, and caused the deed to be made to himself. If, then, appellant, by his own act, had the property conveyed to himself, when Gross, the grantor, intended to convey to his wife, appellant became trustee by his own procurement, and under the authorities cited he is to be regarded as holding the property in trust for appellee. The Statute of Frauds cannot, under the facts here established, be invoked to aid in the commission of a fraud, which would be the case if appellant was allowed to hold the land.

Much has been said in the argument in regard to the conveyance having been made to defraud creditors; but it will not be necessary to devote much time to this branch of the case. No creditors seem to be complaining, and so far as appears, this defence is not resorted to in order to aid any creditor, but solely to enable appellant to hold property not owned by him, — property for which he never paid a dollar. Surely, the equities of the case are all against the claims of appellant.

But conceding the general rule to be that a court of equity will not aid a party to get back property which he has conveyed to another with the intention of defrauding creditors, the question recurs whether such a case is presented by this record. Gross himself testified, that in July, 1877, when the deed was made, he owed nothing, and had no creditors except his brother, George, and appellant, and that they both advised him to make the deed. It also appears from one of the letters read in evidence, that Mary Fischbeck, who represented whatever claim the estate of John L. Gross held against the grantor in the deed, knew of and advised the conveyance. Appellant relied upon various letters written by Gross to different members of his family, to establish his indebtedness.

While it is quite evident from the letters that Gross was not a thrifty business man, and did not possess a large amount of property, and might be somewhat embarrassed in his affairs, yet, with one exception, the letters do not show to whom he was indebted, or the amount. If Gross was insolvent, as claimed by appellant, why did he not introduce proof showing the names of creditors, and the amounts due them? In a letter to his father, dated May 27, 1876, which was read in evidence by appellant, Gross gives a detailed statement of his debts at that time; and from this statement, after deducting the amount due him, which he expected to apply on his debts, he would only be indebted at the end of the month in the sum of \$500. The evidence introduced to show that Gross was insolvent, and that the deed was made to hinder, delay and defraud creditors, is, in our judgment, too vague, uncertain and indefinite to be relied upon to establish that fact.

Appellant, as appears from the evidence, paid \$160, on April 23, 1877, interest on the mortgage on the premises. In stating the account, the master in chancery refused to allow appellant credit for this amount. As this was paid to relieve the premises from an incumbrance, we see no reason why the amount should not have been allowed, in stating the account. The fact that the money was paid at the request of William Gross, one of the tenants in common, did not matter. By the payment of the money the land was so far relieved from an incumbrance resting upon it, and each one of the owners should be charged with the amount paid, in proportion to the land owned by him.

Sixty-four dollars and forty-four cents was expended by appellant for repairs on the premises prior to July 20, 1877. This amount the master rejected. This, in our judgment, was a proper charge, and should have been allowed.

In other respects the decree of the circuit court is correct. The decree of the circuit court will be reversed, and the cause remanded, with directions to so modify the decree as to allow the two items indicated herein.

*Decree reversed.*¹

¹ See also *Stahl v. Stahl*, 214 Ill. 131 (confidential relationship); *Hilt v. Simpson*, 230 Ill. 170 (confidential relationship); *Stout v. Stout*, 165 Iowa 552 (actual fraud, undue influence and confidential relationship); *Goldsmith v. Goldsmith*, 145 N. Y. 313 (confidential relationship).

EDITH M. AHRENS BY ANNIE H. AHRENS, HER GUARDIAN *ad Litem*, APPELLANT, v. JONES, RESPONDENT.

COURT OF APPEALS, NEW YORK. 1902.

169 N. Y. 555.

APPEAL from a final judgment, entered July 5, 1899, in favor of defendant, upon an order of the Appellate Division of the Supreme Court in the first judicial department, which affirmed an interlocutory judgment sustaining a demurrer to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action.

The nature of the action and the facts, so far as material, are stated in the opinion.

HAIGHT, J. This action was brought to declare and enforce a lien upon real estate. The material facts alleged in the complaint are that one Harry Jones, late of the city of New York, on the 25th day of February, 1897, being sick and not expecting to live and being desirous of disposing of his property before he died, conveyed certain premises, specifically described, to his two daughters, and also conveyed certain other premises, also specifically described, to the defendant Clara M. Jones, his wife; that at the time of the execution and delivery of the deed to his wife it was expressly understood and agreed between them that, as a part of the consideration of the same and as a condition upon which the same was executed, the said Clara M. Jones should pay to the plaintiff and to one Price, the grandchildren of said Harry Jones, each the sum of one thousand dollars, which several sums the defendant promised and agreed to pay to each of such grandchildren; that on the 27th day of May, 1897, Harry Jones died, leaving him surviving his widow, the defendant, two children, Anna H. Ahrens and Rosetta Wiley and two grandchildren, Harry S. Price and the plaintiff, both under age; that he owned no other real estate, and the execution and delivery of the deeds above set forth were intended by him and so understood and agreed by the defendant to be an equitable disposition of his property between his widow, his children and grandchildren, and that the property conveyed to the defendant was of much greater value than the property conveyed to his two children, and that his widow has no other property; that since his death demand has been made upon the defendant to pay or secure to the

plaintiff the sum of one thousand dollars but that the defendant has refused and neglected to pay or secure the same, and claims that she is under no obligation to fulfill her promise. Judgment is demanded that the sum of one thousand dollars be declared a lien upon the premises conveyed to the defendant, and that the premises be sold by and under the direction of the court, and out of the proceeds the plaintiff be paid the amount due and owing to her.

It is contended on behalf of the respondent (1) that the grandfather of the plaintiff owed her no duty, was under no obligation to support her, and that none of the consideration for the deed proceeded from her; that there was no privity of contract between her and the defendant, and that the promise of the defendant does not bring her within the scope of the decision in *Lawrence v. Fox* (20 N. Y. 268); (2) that there is no trust, express or implied, alleged in favor of the plaintiff, and (3) that the right to a lien for a part of the purchase price is personal to the vendor.

The complaint has been somewhat carelessly prepared, but upon demurrer all of the facts alleged, or that by reasonable and fair intendment may be implied, are deemed admitted, and it remains to be determined whether the plaintiff has any cause of action under the facts so alleged. *Coatsworth v. Lehigh Valley R. R. Co.*, 156 N. Y. 451.

The complaint, as we have seen, alleges that on the 25th day of February, 1897, the grantor, being sick and not expecting to live long, and being desirous of disposing of his property before he died, executed the conveyance to the defendant; that upon the delivery of the deed to her it was intended by him, and so understood and agreed by the defendant, to be an equitable disposition of his property between his widow, his two children and his two grandchildren. It is, therefore, apparent that the deed was executed in contemplation of death, for the purpose of effecting a distribution of his property between the persons he deemed to be the proper objects of his bounty. The execution and delivery of the deed, under such circumstances, is analogous to a devise made by will and is largely controlled by the rules of law applicable thereto.

If the contention of the defendant is sound, the plaintiff has no remedy, either at law or in equity. What then is the situation in which the defendant places herself? Her husband was sick, and expecting to die; he was desirous of disposing

of his property among the members of his family. She, in order to induce him to give her a deed of the premises in question and as part of the consideration therefor, agreed with him to deliver to his two granddaughters one thousand dollars each. As soon as he died she refused to carry out her promise, and now insists that she is not liable thereon. She thus obtains the property, and refuses to perform her agreement. This is an attempt to perpetrate a fraud not only upon her husband, who was induced to make the gift to her by reason of her promise, but also upon the plaintiff, who presumably would have been otherwise provided for by her grandfather had it not been for the defendant's promise. It is true there is no express trust created by the deed, or by the promise made by the defendant, but, notwithstanding this, a court of equity is not bereft of power to act, for it may interpose to prevent a wrong, and for that purpose it may declare the grantee a trustee *ex maleficio* for the protection of the grantor's intended beneficiaries. Such a trust does not affect the deed, but acts upon the gift, as it reaches the possession of the grantee, and the foundation for the trust is that equity will then interfere and raise a trust in favor of the persons intended to be benefited in order to prevent a fraud.

In *Matter of O'Hara* (95 N. Y. 403) the testatrix gave to her lawyer, her doctor and her priest absolutely the bulk of her estate, practically disinheriting her relatives. It appeared, however, that the devise and bequest in its absolute and unconditional form was made upon a promise of the legatees and devisees to apply the property to charitable uses, in accordance with a letter of instructions which she had prepared. FINCH, J., in speaking for the court, says: "If, therefore, in her letter of instructions, the testatrix had named some certain and definite beneficiary, capable of taking the provision intended, the law would fasten upon the legatee a trust for such beneficiary and enforce it, if needed, on the ground of fraud. Equity acts in such case not because of a trust declared by the testator, but because of the fraud on the legatee. For him not to carry out the promise by which alone he procured the devise and bequest, is to perpetrate a fraud upon the deviser which equity will not endure." Again, he says: "If, on the ground of fraud, equity as it has often done, and will always do, fastens a trust *ex maleficio* upon the fraudulent legatee or devisee for the protection of a named

REARDON AND OTHERS v. REARDON AND ANOTHER.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1914.

219 Mass. 594.

BILL IN EQUITY, filed in the Superior Court on May 26, 1914, by four of the five children of Jeremiah Reardon, deceased, against Ann C. Reardon, the widow of Jeremiah, and Anastasia D. Reardon, who was a daughter of Jeremiah and Ann and a sister of the plaintiffs, containing the allegations described in the opinion, and praying that the real estate there mentioned, which was conveyed by Jeremiah to the defendant Ann, be declared to have been held by her upon a trust created by an oral agreement between Jeremiah, now deceased, and the plaintiffs and the defendants, and now to be held subject to that trust by the defendant Anastasia, to whom it was conveyed by the defendant Ann as stated in the opinion, and for further relief.

The defendant Anastasia demurred to the bill.

The case was heard upon the demurrer by MORTON, J., who sustained the demurrer, and reported the case under R. L. c. 159, sec. 27, for determination by this court, with a stipulation of the parties that, if the order sustaining the demurrer was right, the bill was to be dismissed with costs; and that, if that order was erroneous, the defendants were to answer over.

The case was argued at the bar in November, 1914, before RUGG, C. J., HAMMOND, SHELDON, DECOURCY, & CROSBY, JJ., and afterwards was submitted on briefs to all the justices then constituting the court.

RUGG, C. J. The plaintiffs are four of the children and the defendants are the widow and a daughter of Jeremiah Reardon, deceased. Collectively they constitute all his heirs. The parties to the bill other than the widow, Ann C. Reardon, also constitute all her heirs apparent. The material allegations of the bill are that Jeremiah, having made a will in substance devising the use of his real estate to his wife during her life and on her death in equal shares to his children, was importuned by the wife to transfer the same to her absolutely upon her representation and promise that in the event of such conveyance she would on her death cause it to be divided among their children in equal shares; and that, in accordance with an oral agreement between Jeremiah and all the parties

hereto, such conveyance was made, the grantor relying upon the assurance of Ann and the trust and confidence which he reposed in her; and that, for a time after the decease of Jeremiah, Ann acknowledged the obligations thus resting upon her and intended in general to carry them out; but later, being ill and weak of will, through the fraud and undue influence of the other defendant, Anastasia, the widow has been induced to make in violation of this promise a conveyance of the real estate to the other defendant in fee. Jeremiah died on June 20, 1905, and the deed from Ann to Anastasia is dated May 20, 1914. The plaintiffs ask leave to amend their bill by inserting an allegation to the effect that the conveyance by Jeremiah to his wife was made in anticipation of his death, which occurred soon after. Leave is granted to make this amendment, St. 1913, c. 716, sec. 3, and the case is considered on that footing. There is nothing on this record to show that Ann has appeared or contests the suit, nor has the bill been taken *pro confesso* against her. The case is reported by a judge of the Superior Court on his ruling that a demurrer filed by Anastasia be sustained. That is the only matter now before us.

The case set forth in the bill is that of a grant of land by Jeremiah to Ann upon an oral trust and agreement to hold for her own benefit during her life and to see that upon her death title should vest in their children, a recognition by Ann of the existence of this oral trust and willingness and intent on her part to execute it according to its terms, and on the part of Anastasia, (she well knowing all these facts and the trust, and having been a party to the initial oral agreement between Jeremiah and Ann and all her brothers and sisters,) the exercise of fraud and undue influence over her mother, then too weak of will and infirm of mind to adhere to her design of executing the trust, whereby Ann has been induced to abjure the oral trust and in violation thereof Anastasia has become possessed without consideration of the record title to the fee of the land.

The question is whether these facts constitute a ground for equitable relief against Anastasia. On the allegations of the bill Ann was always ready and willing to execute the trust, until she was overpowered by the fraud of Anastasia. *Twomey v. Crowley*, 137 Mass. 184. Ann no longer holds the title to the land. So far as concerns the record, that title has vested

in Anastasia. Relief, if any is to be afforded, must run against Anastasia as the holder of the title. It does not lie in her mouth to object that her mother was not obliged legally to do that which she was bound morally to do, and that hence she herself is to hold that which she has gained by fraud. The mother on the allegations of the bill was ever ready to keep her word and discharge her trust. The fraudulent influence of Anastasia alone has prevented her from doing so. Anastasia, having known about the mother's purpose and having been a party at the first to the oral trust agreement, cannot in equity hold the fruits of such conduct. She has secured by fraudulent influence possession of and the record title to property which she knew in good conscience belonged to somebody else. Equity will not permit her to retain property thus acquired by a fraud on the rights of the plaintiffs. It will relieve against such a fraud and intercept the legal title in the hands of Anastasia and at least compel her to reconvey it to Ann who on the allegations of the bill always has been ready if left to herself to hold it subject to the trusts and uses for which it was intended by Jeremiah. The statute of frauds is no shield to Anastasia. *Wall v. Hickey*, 112 Mass. 171. *Moore v. Crawford*, 130 U. S. 122, 129. Equity will strip a person of property obtained by such fraud.

There is nothing in the circumstance that the original trust was between a husband and wife which affords any protection to the defendant Anastasia.

It follows that the order sustaining the demurrer was erroneous. When the plaintiffs shall have filed an amendment to the bill in effect alleging that the conveyance by Jeremiah to Ann was made in anticipation of his death, which occurred soon after, then, in accordance with the terms of the report, the demurrer is to be overruled and the defendants are to answer over.

So ordered.

DIXON v. OLMIOUS.

CHANCERY. 1787.

1 Cox Eq. 414.

THE BILL was filed by some of the specialty and simple contract creditors of the late Lord Waltham on behalf of themselves and the other creditors, and also by some of the

legatees under his will on behalf of themselves and the other legatees, praying that the will might be established, and the trusts thereof performed and carried into execution; that the personal estate might be applied in payment of debts and legacies, and if not sufficient, that a competent part of the real estate might be sold for that purpose.

It stated that on 2d February, 1787, Lord Waltham made his will, and thereby charged his real estates with the payment of his debts in the manner there mentioned, and died on the 10th February following, leaving the defendant Elizabeth, the wife of the defendant Olmius, his sister and heir at law; that the defendants pretended that this will had been revoked by a fine levied and recovery suffered of the real estates charged by the will with payment of the debts, subsequent to the said will. The bill then charged, that if such fine and recovery did operate as a revocation of the will, yet that Lord Waltham only intended such fine and recovery to answer some particular purposes, and that he meant and intended to republish his said will, but was prevented from so doing by several acts of fraud and violence on the part of the defendant, who would not permit the attorney sent for by Lord Waltham to go into his bed-room, together with several circumstances of fraud very fully charged by the bill.

To this bill the defendants put in a demurrer, and a plea and an answer. The demurrer was as to so much of the said bill as required from the defendants a discovery whether the said Lord Waltham did not mean or intend to republish his said will. The plea was to such parts of the bill as prayed any relief in respect of the real estate, and the plea was the fine and recovery, with an averment that Lord Waltham died intestate. The plea was argued at the same time with the demurrer, but was overruled on a point of form.

By the answer the defendants gave explicit denials to the several charges of fraud and obstructing the republication of the will.

Mr. Recorder and *Mansfield* in support of the demurrer argued that the discovery sought was wholly immaterial, which was in itself a good ground of demurrer; it could be of no consequence what the defendant thought to be the intention of Lord Waltham, nor indeed what he did in fact intend, for if the fine and recovery have in law operated a revocation of this will, there must be an actual republication of it in order

to give it any effect, and the intentions of Lord Waltham could never get rid of the requisites imposed on a will of real estate. But if such a discovery were material, and could have any operation in giving new effect to this will, then it would be calling upon the heir at law to make discovery of an adverse title; that this was what the Court would never compel an heir at law to do, who always stood in a favoured light in a Court of Equity; that this had been frequently determined in the case of a purchaser for a valuable consideration, and the same principle would extend to the case of an heir, who was entitled to an equal protection from the Court.

LORD CHANCELLOR [THURLOW]. The charge of the bill is, that Lord Waltham had an intention to republish his will, and that such intention was frustrated by the fraud of the heir at law, or at least of her husband. I think it impossible to separate the fact of Lord Waltham's intention, from the facts of fraud imputed. The defendants must answer the former as well as the latter.

*The demurrer was overruled.*¹

CALDWELL, *etc.* v. CALDWELL.

COURT OF APPEALS, KENTUCKY. 1871.

7 Bush 515.

CHIEF JUSTICE ROBERTSON delivered the opinion of the Court. In the year 1863 Alexander Caldwell, a citizen of Campbell County, Kentucky, shortly before his death, published his last will, whereby he contemplated a proximate equality in the distribution of his estate among his six children, one of whom, James Caldwell, was then a soldier in the Confederate army. The testator, sympathizing with that son and the cause he had espoused, indicated a desire to secure to him "the home place" of nearly three hundred acres of land, which would not have exceeded the value of the devises to each of his other five children then near him. But apprehending that James, if he should even survive the war, might by his rebellion against the Government of the United States forfeit his estate, he devised the legal title of the "home place" to

¹ See *Mestaer v. Gillespie*, 11 Ves. 621, 638; *Bulkley v. Wilford*, 2 Cl. & Fin. 102, 177.

his other five children, on a latent trust that if James should ever return, and be capable of holding the title, they should convey it to him. And this, according to satisfactory oral testimony, they understood and tacitly agreed to fulfill.

On his return, about the close of the war, there being no danger of forfeiture, two of those devisees, Daniel and William Caldwell, true to the trust, each conveyed to him one fifth of the land, of the whole of which he thereupon took possession with the apparent acquiescence of the other three devisees of the home tract; and this possession he appears to have retained without disturbance or complaint for more than three years, when the three recusant devisees and the husband of one of them refusing to convey their interests to him, he on the 10th of September, 1869, brought this suit against them for enforcing their obligation under a resulting trust. His petition charging the trust was denied by their answer; and on that issue the circuit court decreed a release to James of their title, and by this appeal they seek to reverse that decree.

Implied trusts being excepted from the statute of frauds and perjuries, if the facts establish such a trust in this case, no written memorial of it was necessary for enforcing it, nor was the oral testimony incompetent on the alleged ground that it contradicts the will.

Extraneous testimony is incompetent to supply an unintentional omission or to contradict an expressed intention in a will. But the facts established by extrinsic evidence in this case have no such aim or effect. They are consistent with the testator's intention, and with the concession that the will is just what he intended it to be, and they supply nothing which he unintentionally omitted. He intended to pretermitt his son James as an express devisee of the land, and to rely for his benefit on the plighted honor of the express devisees. Might he not have done so securely on a promise that the five devisees would pay to James ten thousand dollars? And would proof of such agreement contradict the will, or supply any unintentional omission in it, without which omission his purpose of making James a co-equal beneficiary might have been frustrated by impending forfeiture?

The competency of oral testimony for establishing and enforcing such trusts as that claimed in this case is prescriptively recognized by undeviating authorities, among a great multitude of which we only cite the following: *Drakeford v.*

Weeks, 3 Atkins, 639; *Barrow v. Greenhough*, 3 Vesey, 152; *Stickland v. Aldridge*, 9 Vesey, 519; *Maislar v. Gillespie*, 11 Vesey, 639; 2 Powell on Devises, 415. To these citations we might, if deemed needful, add many others in England and America, and even in this court, illustrative of the same principles.

On the like principles the most familiar class of resulting trusts is upheld. Why else, where an unqualified title to land is conveyed to one, the law has adjudged that he holds it in trust for another on oral proof that the latter paid the consideration, in the absence of any fact authorizing a counter-vailing presumption? In such a case there is no sale of land by the one to the other requiring writing, and the extraneous fact is admitted not to contradict the deed, but to prevent a fraud.

So here, had not the actual devisees been understood by the testator as accepting the devise in trust for James, an essentially different will would have been made, excluding their power over the land as devised; and consequently their refusal to execute the trust is a constructive fraud on the testator as well as on their brother James.

The proof of the trust is corroborated by the conduct of Daniel and William, by the testator's purpose of equality, and by the apparent recognition of it by the acquiescence in the claim and possession by James for years since his return.

We are satisfied that the will was made as it is, with the mutual understanding of the trust as claimed.

Wherefore we conclude that the judgment of the circuit court is right, and therefore affirm it.¹

¹ *Shields v. McAuley*, 37 Fed. 302; *De Laurencel v. De Boom*, 48 Cal. 581 (promise in writing); *Dowd v. Tucker*, 41 Conn. 197 (actual fraud); *Buckingham v. Clark*, 61 Conn. 204; *Gilpatrick v. Glidden*, 81 Me. 137; *Laird v. Vila*, 93 Minn. 45; *Ragsdale v. Ragsdale*, 68 Miss. 92; *Benbrook v. Yancy*, 96 Miss. 536; *Smullin v. Wharton*, 73 Neb. 667 (*semble*); *Carver v. Todd*, 48 N. J. Eq. 102; *Powell v. Yearance*, 73 N. J. Eq. 117; *Heinisch v. Pennington*, 73 N. J. Eq. 456 (*semble*); *Matter of Minturn*, 5 Dem. (N. Y.) 508; *Hoge v. Hoge*, 1 Watts (Pa.) 163; *Jones v. McKee*, 3 Pa. 496; *Church v. Ruland*, 64 Pa. 432; *Socher's Appeal*, 104 Pa. 609; *Hoffner's Estate*, 161 Pa. 331; *Blick v. Cockins*, 234 Pa. 261, *accord*. Compare *Lewis v. Corbin*, 195 Mass. 520 (tort action).

The same result is reached in cases where an heir by promising to hold property, which descends to him, in trust for a third person thereby induces the ancestor to refrain from making a will. *Ransdel v. Moore*, 153 Ind. 393; *McDowell v. McDowell*, 141 Iowa 286; *Gemmel v. Fletcher*, 76 Kan.

MOORE, ADMINISTRATOR, v. CAMPBELL, EXECUTOR.

SUPREME COURT, ALABAMA. 1896.

113 Ala. 587.

THE BILL in this case was filed by William R. Moore, as administrator of Ella M. Donegan, deceased, against A. Campbell, individually, and as executor of the last will and testament of Mary P. Rice.

The bill alleges that Mary P. Rice executed her last will and testament on September 27, 1884, and added a codicil thereto on October 24, 1884; that on August 19, 1885, she departed this life, and on November 4, 1885, the said will and codicil were duly admitted to probate, and letters testamentary issued to the defendant, Archibald Campbell, as the executor named therein; that said A. Campbell was named in said will as the residuary legatee and devisee, and that he accepted the same upon the distinct promise and agreement made with the testatrix, that out of the proceeds of the residuum of her property so devised and bequeathed to him, he would give to Ella M. Donegan, who was then living, and who was a warm and special friend of the deceased, \$500; that this was a verbal trust, which was reposed in said A. Campbell by the said testatrix, on account of her confidence in him, and

577; *Grant v. Bradstreet*, 87 Me. 583; *Tyler v. Stitt*, 132 Wis. 656. But see *Bedilian v. Seaton*, 3 Wall. Jr. 279; *Cassels v. Finn*, 122 Ga. 33.

But in a few jurisdictions it has been held that in the absence of actual fraud or active inducement by the devisee or legatee or heir or of a confidential relationship between the devisee or legatee or heir and the testator or intestate the intended beneficiary cannot take. *Moore v. Campbell*, 102 Ala. 445; *Evans v. Moore*, 247 Ill. 60; *Orth v. Orth*, 145 Ind. 184; *Moran v. Moran*, 104 Iowa 216; *Sprinkle v. Hayworth*, 26 Grat. (Va.) 384.

In the following cases there was not sufficient evidence of intention of the testator or intestate to impose a legal obligation on the devisee or heir: *McCormick v. Grogan*, L. R. 4 H. L. 82; *In re Pitt Rivers*, [1902] 1 Ch. 403; *Attorney General v. Chamberlain*, 90 L. T. 581; *Sullivan v. Sullivan*, [1903] 1 I. R. 193; *Udike v. Mace*, 194 Fed. 1001; *Bennett v. Littlefield*, 177 Mass. 294; *Gaither v. Gaither*, 3 Md. Ch. 158; *Aumack v. Jackson*, 79 N. J. Eq. 599; *Van Houten v. Stevenson*, 74 N. J. Eq. 1, 15; *Collins v. Hope*, 20 Oh. 492; *Sprinkle v. Hayworth*, 26 Grat. (Va.) 384.

On the question of inheritance taxes, see *People v. Schaefer*, 266 Ill. 334.

For conflicting cases on the question whether the intended beneficiary of a secret trust is disqualified as a witness to the will, see *In re Fleetwood*, 15 Ch. D. 594; *O'Brien v. Condon*, [1905] 1 I. R. 51.

See 20 *Harvard Law Review*, 549; 28 *Ibid.* 237, 366.

he accepted the trust with the distinct and positive promise made to her, at the time, that he would carry it out. The bill then prays for the establishment of this trust, and that a decree be rendered in favor of the complainant against the said Campbell individually, and as executor.

The defendant demurred to this bill, and the Chancellor rendered a decree sustaining the demurrer. The complainant appealed and the decree was affirmed.¹

After the affirmance of the decree on the former appeal, the bill of the complainant was amended so as to aver facts to show that the trust which was sought to be engrafted was in reference to personal property; and the purpose of the amended bill is to engraft a parol trust upon a bequest of personal property after the probate of the will. The bill as amended was demurred to on the ground that no trust was created in favor of the complainant's intestate by the will of Mary P. Rice, deceased; that the purpose of the bill, in that it seeks to engraft a parol trust upon a written bequest or legacy, is in defiance of the statute of will.

On the submission of the cause, the chancellor rendered a decree sustaining the demurrers. The complainant appeals from this decree, and assigns the same as error.

COLEMAN, J. When this case was here on former appeal, (102 Ala. 445), we discussed at length the question of engrafting a parol trust upon a devise or bequest, after the probate of the will. In the opinion we used the following language: "The principle that a parol trust may be engrafted upon a devise or bequest after the probate of a will was declared in *Bishop v. Bishop*, 13 Ala. 475, and followed in *Barrell v. Hanrick*, 42 Ala. 60. We do not feel at liberty to depart from the rule declared in these decisions, inasmuch as the statute of wills was re-enacted in the same language, after the rendition of these decisions; and it is not necessary to a decision of the present case."

The bill, as then framed, justified the conclusion, that the trust set up pertained to realty. We held that this was prohibited by statute — section 1845 of the Code of 1886 — citing many authorities. After the remandment of the cause, the bill was amended, so as to charge that the trust related only to personalty. We are constrained by our former ruling,

¹ This part of the statement of facts is taken from a report of the same case at an earlier stage in 102 Ala. 445.

following the cases in 13 Ala. and 42 Ala. *supra*, to hold that such a trust is not obnoxious either to the statute of frauds or the statute of wills, and may be enforced. The remedy is with the legislature.

Reversed and remanded.

BRICKELL, C. J., not sitting.¹

SWEETING v. SWEETING.

CHANCERY. 1863.

10 Jur. N. S. 31.

THIS SUIT was instituted for the purpose of obtaining a declaration by the Court of the rights of the persons interested in certain hereditaments devised by the will of Robert Hicks.

Robert Hicks, by his will, dated the 13th July, 1825, devised three freehold messuages at Godmanchester, in the county of Huntingdon, to his wife Mary Hicks for life; and after her decease, to Henry Sweeting and John Sweeting, their heirs and assigns for ever. This devise was, as the bill admitted, made by Robert Hicks to Henry Sweeting and John Sweeting, upon a secret understanding that they should convey and make over the said messuages to, or in favour of, the free grammar-school at Godmanchester. Robert Hicks died on the 30th July, 1825, leaving his brother John Hicks, his heir-at-law, him surviving; and John Hicks died intestate, and without issue, in September, 1827, his heir-at-law being at present unknown. Soon after the death of Robert Hicks, Henry Sweeting and John Sweeting, with the view of carrying out the secret trust, caused to be prepared the draft of a conveyance of the three messuages for the benefit of Godmanchester School; but the conveyance was never executed, as

¹ In the following cases of bequests of personalty a constructive trust for the intended beneficiary was imposed: *People v. Schaeffer*, 266 Ill. 334; *Baillee v. Wallace*, 17 W. R. 223; *Norris v. Frazer*, L. R. 15 Eq. 318; *French v. French*, [1902] 1 I. R. 172; *O'Brien v. Condon*, [1905] I. R. 51; *Williams v. Vreeland*, 29 N. J. Eq. 417; *Yearance v. Powell*, 55 N. J. Eq. 577; *Belknap v. Tillotson*, 82 N. J. Eq. 271; *Rutherford v. Carpenter*, 134 N. Y. App. Div. 881; *Reynolds v. Reynolds*, 167 N. Y. App. Div. 90; *Gaullaher v. Gaullaher*, 5 Watts (Pa.) 200; *McLellan v. McLean*, 2 Head (Tenn.) 684; *Richardson v. Adams*, 10 Yerg. (Tenn.) 273; *Brook v. Chappell*, 34 Wis. 405.

The result is the same where the next of kin induces the intestate not to make a will. *William v. Fitch*, 18 N. Y. 546.

they were advised that, under the law of mortmain, such a conveyance would have been void.

John Sweeting died in 1838. Henry Sweeting died in 1848, having by his will devised all his freehold hereditaments to the plaintiff Charles Sweeting and the Rev. Henry Sweeting, upon trust, after satisfying a certain covenant and proviso, to pay the rents and profits to Julia Sweeting for her life; and after her decease, to the Rev. Henry Sweeting for his life; and after his decease, to stand possessed of the said hereditaments, to the use of the children or child of the Rev. Henry Sweeting, as tenants in common. Julia Sweeting died in 1857. The Rev. Henry Sweeting died in 1857, leaving three children, one of whom was heir-at-law, both to his father and to Henry Sweeting.

Mary Hicks died in December, 1862, and the plaintiff having been since her death in possession of the three messuages, now filed his bill against the three children of the Rev. Henry Sweeting and her Majesty's Attorney-General, praying a declaration of the rights of all parties.

Baily and Renshaw, for the plaintiff, contended that he was entitled to institute this suit. The plaintiff was trustee, and the legal estate passed to him by the devise, which was good, the secret trust only being bad. [They cited *Lewin on Trusts*, 54, 4th ed.; and as to the principles of this Court in dealing with cases of secret trusts for charitable purposes, *Adlington v. Cann*, 3 Atk. 141; *Edwards v. Pike*, 1 Eden, 267; *Boson v. Statham*, *Id.* 508; *Bishop v. Talbot*, cited in *Muckleston v. Brown*, 6 Ves. 52-67; *Wallgrave v. Tebbs*, 2 Kay & J. 313; 2 Jur. N. S. 83; and *Tee v. Ferris*, 2 Kay & J. 357; 2 Jur. N. S. 807.]

Osborne Morgan, for the children of the Rev. Henry Sweeting. — If the devise is valid, and there be a resulting trust, then, if there be no heir-at-law, the *cestuis que trust* under the will of Henry Sweeting are entitled for their own benefit; as, according to *Burgess v. Wheate*, 1 Eden, 223, there can be no equitable escheat. [He cited *Lewin on Trusts*, 50, last ed.; *Stickland v. Aldridge*, 9 Ves. 519; *Barrow v. Greenough*, 3 Ves. 152; and *Lomax v. Ripley*, 3 Sm. & G. 48; 1 Jur. N. S. 272.]

Wickens, for the Crown, contended that the plaintiff had no legal or equitable interest, and that the bill should be dismissed. If the trust had been on the face of the will, the devise would have been void. (*Doe d. Burdett v. Wrighte*,

2 B. & Al. 710). If there is a devise, and the secret trust does not exhaust the whole property, the devise is partly good and partly bad, and there is a resulting trust in favour of the heir-at-law. Here the Court must hold the devise void. [He cited stat. 9 Geo. 2, c. 36, ss. 1, 3; *Paine v. Hall*, 18 Ves. 475; and *Colclough v. Boyse*, 6 H. L. C. 2.]

Baily, in reply.

SIR R. T. KINDERSLEY, V. C. Henry Sweeting was at the time of his death tenant in fee-simple, subject to a life interest, of this real estate of Robert Hicks. But there is no doubt that the devise in question was made upon what is called "a secret trust." Now, what does the term "a secret trust" mean? It means, that there has been a contract, agreement, or understanding between a testator and A. B., that if the property is devised to A. B., he will treat it in a particular manner; and it is called a secret trust simply because it is not expressed in the will; not because no person knows of it, for it may have been arranged before fifty witnesses. It means, that upon the face of the will, the devise being absolute, there is before the will something, either *viva voce* or written, constituting an engagement on the part of the devisee not to avail himself of the devise, but to apply it in a particular manner.

Supposing A. devised property to B. in fee, and B. agreed to hold it for the benefit of C., C. cannot go to a court of law and claim to recover by ejectment; but he can come here and say, "It is true that I cannot ask a court of equity to import into the will anything which is not in it, but it is against conscience of, and a breach of, that faith which is due between man and man, that this devisee, who accepted the devise upon an agreement for my benefit, should turn round, and say, 'I am the owner, and there is nothing you can look at beyond the devise in the will in my favour.'" The court of equity will attach a trust to the devisee as a consequence of his engagement with the testator; not because the testator intended the property to be so held. For if the testator, without thy understanding with A. B., devised his estate to him, and expressed in writing, by a codicil not duly executed, that his intention in devising to A. B. was, that he should hold the property for C. D., that would not enable C. D. to come here and say that A. B. was a trustee for him. A. B. would be entitled to say, "There is the will; if you bring parol evidence of the testator's intention to devise for the benefit of some one

else, you are violating the Statute of Frauds, and importing into the will that which is not therein." The expression "parol" means not merely that which is verbal, but it may mean "written." But no court, either of law or equity, can look out of the devise as to intention, unless an engagement or understanding can be made out on the part of the devisee to accept it on such a footing, or unless he was aware of the testator's intention, and either in words or tacitly accepted it. The intention of the testator, by itself is of no avail or consequence. Such are the principles applicable to the simplest case.

Now, suppose the understanding was, that the devisee should hand over the property to a charity. The same principle applies. It is against conscience as much in this case as in the other, that the devisee, having made such an arrangement, should hold for his own benefit; and unless the Statute of Mortmain contains expressions clearly altering the state of things, or unless there is some decision on the subject, we must apply the same principles. Here, if it was not for the Statute of Mortmain, as in the simple case put, the charity would be entitled to come to this Court and say, "It is against conscience that the devisee should hold this property, there being an undertaking to apply it for our benefit;" not because of the testator's intention, but because an agreement existed which the Court will not allow the devisee to depart from, and this Court would attach the trust. A court of law cannot declare such a trust; it cannot look at a state of things which constitutes a trust; it has no jurisdiction to do so. Then, the Statute of Mortmain, in its 3rd section, enacts, "that all gifts, grants, transfers, settlements of lands, or any interest in lands" (and these words are held to include gifts by will), "to or in trust for any charitable use whatsoever, etc., should be absolutely void." What, then, is the effect of going to law or equity upon this language? If you go to law, the Court must say, "We must ascertain whether this is a devise to a charity solely by looking at the will." But here there is nothing of that sort in the will, yet by parol we can prove that the intention of the testator, acquiesced in by Henry Sweeting, was so and so. Would not the court of law say, "We cannot look at that; we must see by the will whether it is a devise to a charity or not?"

Now, it has been contended that there is a conflict between the Statute of Frauds and the Statute of Mortmain; and if

it is so, Lord Hardwicke has most distinctly said that the Statute of Mortmain must give way to the Statute of Frauds. The latter enacts, that no parol evidence shall control a devise. The Statute of Mortmain enacts, that a devise to a charity shall be void. I do not see the conflict, because you cannot see whether there is a devise to a charity except by looking at the will. If you say that it was the testator's intention that the charity should take, you are admitting parol evidence against the Statute of Frauds. We have then a devise to Henry Sweeting in fee, and no other devise; it is not on the will, in trust for a charity, or a charitable purpose; but we have this also — that Henry Sweeting agreed with the testator that he would hold the property in trust for a charity. A court of law cannot touch that, because it is on the devisee's conscience. If there could be an action at law, on which I say nothing, it would be one for damages for breach of a promise or agreement. It could not be an action on a question of conscience. Then when a party comes to a court of equity, that court looks at the matter in exactly the same manner with respect to the devise and will import nothing into the will; but he comes here on the ground, that it is against conscience that the devisee should hold the estate for his own benefit, and it having been intended, not for the benefit of the heir-at-law, but for the benefit of a charity, which charity cannot hold the lands, this Court considers that there is a resulting trust in favour of the heir-at-law. There would be a resulting trust in favour of the charity, except that the law says there shall be no secret trust for a charitable purpose. It is strongly confirmatory of this view, that in all the cases there is no instance in which the heir-at-law has attempted to go into a court of law to oust the devisee; but there are numerous cases in which he has come into equity and obtained a declaration that the devisee ought to be declared a trustee for him, and a consequent decree for reconveyance. It appears to me, that every one of those cases must have been wrong if there was a legal remedy. If the heir can go to law, he cannot come here; if he can recover at law, a demurrer would lie to his bill here. It is said that in *Adlington v. Cann*, 3 Atk. 141, there was, in the mind of the learned judge (Lord Hardwicke), an idea that there was such a legal right in the heir. But in that case there was a bequest of leaseholds and personal estate, as well as a devise of freeholds to the defendants, who were

also executors. So that this Court could entertain the bill, as there would be an account of personal estate; and as the secret trust did not appear to him to be made out, Lord Hardwicke gave the heir-at-law an opportunity of going to a court of law, offering meanwhile to retain the bill for a twelvemonth. The plaintiff, however, did not avail herself of it.

There is nothing, therefore, in conflict with my views. I feel strongly in this case, and my opinion is confirmed by the more recent decisions, and by the general feeling of the profession, as expressed in text-books. What I should wish to have done is this:—The case of the Crown depends upon there being a legal estate, as there is no escheat of an equitable interest; and if I could, I would retain the bill, and leave the Crown to recover at law; but I am precluded by the recent statute (25 & 26 Vict. c. 42), the intention, if not the letter, of which is, that the judges of the court of equity should determine legal questions. It appears to me, then, that the plaintiff has vested in him a legal estate, as to which he has a right to come to this Court and say, "I am either trustee of this legal estate for the beneficiaries or for the Crown; but I ask the Court to assist me. I do not claim any interest, and I can only be refused if there is no legal estate in me." I think that the legal estate is in him, and that he has a right to come to this Court for relief.

With regard to the law as laid down in *Burgess v. Wheate*, 1 Eden, 223, whether it may or may not be desirable that a different law should exist, I think it would be a great evil if the House of Lords were to reverse that case. It would be a great detriment if, after an important decision has been acted upon for a hundred years, and has many titles depending upon it, it should be overruled.

The plaintiff is, therefore, entitled to a decree, and there must be a declaration that the legal estate was vested in him; that the trust upon which the property was held by John and Henry Sweeting was void, and that there is a resulting trust for the heir-at-law of Robert Hicks, with an inquiry as to who is such heir-at-law. As against the Crown, the bill will be dismissed without costs, because the Crown has opposed the plaintiff's right to come into court, on the ground of escheat.¹

¹ In the following cases in which the devise or bequest was absolute on its face and the devisee or legatee agreed expressly or tacitly with the testator to hold for a purpose which was illegal, a resulting trust was raised. *Stick-*

SCHULTZ'S APPEAL.

SUPREME COURT, PENNSYLVANIA. 1876.

80 Pa. 396

MR. JUSTICE SHARSWOOD¹ delivered the opinion of the court, January 31, 1876. The very able and exhaustive opinions, as well of the auditor as of the learned court below, have relieved us from an examination of the English decisions upon the Mortmain Act of that country. They undoubtedly throw a clear and strong light upon the question presented upon this record. They establish two positions: 1. That if an absolute estate is devised, but upon a secret trust assented to by the devisee, either expressly or impliedly, by knowledge and silence before the death of the testator, a court of equity will fasten a trust on him on the ground of fraud, and consequently the Statute of Mortmain will avoid the devise if the trust is in favor of a charity. But 2. If the devisee have no part in the devise, and no knowledge of it until after the death of the testator, there is no ground upon which equity can fasten such a trust on him, even though, after it comes to his knowledge, he should express an intention of conforming to the wishes of the testator. The latter proposition applies directly to the case now before us. Reuben Yeakle, the legatee named in the will, was not present when the instrument was executed. He had no communication with the testator, directly or indirectly, upon the subject. The testator had long intended to leave his estate for charitable purposes. On his death-bed he sent for a scrivener, and expressed to him his wish to have his property so disposed of after his death. He was informed that if he should die within thirty days, such a disposition would be ineffectual, but that he might make an absolute bequest to some individual, upon the confidence and belief that when he should be informed of his wishes, he

land *v. Aldridge*, 9 Ves. 519; *In re Spencer's Will*, 57 L. T. 519; *Geddis v. Semple*, [1903] 1 I. R. 73; *Kenrick v. Cole*, 61 Mo. 572; *Matter of Will of O'Hara*, 95 N. Y. 403; *Amherst College v. Ritch*, 151 N. Y. 282; *Edson v. Bartow*, 154 N. Y. 215; *Stirk's Estate*, 232 Pa. 98.

But if the testator does not intend to impose a legal obligation on the devisee or legatee, no resulting trust will be raised. *O'Donnell v. Murphy*, 13 Cal. App. 728.

¹ Only the opinion of the court is here given.

would, of his own accord, carry them out. This plan was adopted, and upon the suggestion of one of the bystanders, Reuben Yeakle, the bishop of the church to which the decedent belonged, was chosen by him. It is clear, not only from the evidence, but from the verdict of the jury in the issue of *devi-savit vel non*, that no undue influence was exercised to procure the will. It was the testator's own free and voluntary act, and he was told "that he could dispose of his property to a particular person unconditionally, and if that man would do it, then he could put it to those places where he wanted it; but that would be entirely at his option; he could do it or not." Reuben Yeakle was not informed of the will until some time after the death of the testator. When informed of it he declared his intention to appropriate the money as the testator wished it to be. He said, when examined as a witness before the auditor: "I have not seen the will, but if it gives me the absolute right to the property without condition, I should consider that I had the legal right to do with the property as I pleased. I draw a distinction in this case between the legal and moral right."

We are unshackled by authority upon this question. The English precedents upon the construction of their Statute of Mortmain are not binding upon this court, and with us the question is an entirely new one. By the 11th section of the Act of Assembly of April 26th 1855, Pamph. L. 332, it is provided, "that no estate, real or personal, shall hereafter be bequeathed, devised or conveyed to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible and at the time disinterested witnesses, at least one calendar month before the death of the testator or alienor, and all dispositions of property contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin or heirs according to law."

It seems very clear that the bequest in the will of Frederick Schultz to Reuben Yeakle is not within the words of the statute. There is nothing in the circumstances to fasten a trust upon him. The statute out of the way, the charities intended to be benefited would have had no claim, legal or equitable, to enforce payment by him to them. He would, in the eye of the law, be guilty of no fraud, legal or equitable, either against them or the testator, if he should, even at this

day, change his intentions and apply the money to some other use. Being the absolute owner, under the will, the declaration of his intention would not be binding upon him. It is not, therefore, in the words of the statute, a bequest "to a body politic or to any person in trust for religious or charitable uses." Had Reuben Yeakle been present when the will was executed, or the objects of the bequest been communicated to him before the testator's death, and he had held his peace, there would have been some ground for fastening a trust upon him *ex maleficio*, as in *Hoge v. Hoge*, 1 Watts 163. But nothing of that kind can be pretended here.

It has been contended, however, very strenuously, that as Edward Schultz proposed Reuben Yeakle to the testator as the man, the acceptance of Reuben Yeakle of the bequest recognised Edward Schultz as his attorney, and ratified whatever he had said and done. They urge the maxim, *omnis ratihabitio retrotrahitur et mandato æquiparatur*. It is a very ingenious contention, but unfortunately for the appellants, there is nothing in the evidence upon which it can be built. Edward Schultz did not undertake for Reuben Yeakle; he gave the testator no assurance that he would accept and carry out his intentions when made known to him. He says: "I proposed Reuben Yeakle, so far as I remember, for the man. Frederick then agreed to Reuben Yeakle. Reuben Yeakle was considered to be an honest man, and it was for this reason he was taken, and because he was acquainted with these societies mentioned." "As far as I can recollect, I said that through Yeakle his desire could be carried out in the distribution of his property." "The object was to carry out the wish of Frederick in that way. There was a chance to carry it out in that way if the legatee was willing, and Reuben Yeakle was selected because it was thought he would agree to it." There is nothing in all this which indicates any promise or assurance by Edward Schultz to the testator that Reuben Yeakle would accept the bequest in trust for the charities. There was the mere expression of an opinion, concurred in by the testator, that when the legatee came to understand the object and purpose of the bequest to him, as an honest man he would carry out the intention of the testator.

It is urged, however, that this whole plan is nothing but a contrivance to evade the statute. No doubt such was the intention of the testator. It is said that it is a fraud upon

the law, and that the bequest ought therefore to be declared void. But that overlooks the fact that the absolute property in the subject of this bequest has vested in the legatee, and that he is entirely innocent of any complicity in the fraud of the testator. If the statute is practically repealed by this construction it is evident that it must be for the legislature to devise and apply a remedy, not the judiciary, whose province is not *jus dare* but *jus dicere*.

*Decree affirmed and appeal dismissed at the cost of the appellants.*¹

In re BOYES.

BOYES *v.* CARRITT.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1884.

26 Ch. D. 531

THE will of the testator in this cause, dated the 1st of June, 1880, was in these words: "This is the last will and testament of me, George Edmund Boyes, of. . . I direct the payment of my just debts and funeral and testamentary expenses as soon as conveniently may be after my decease by my executor hereinafter named, and subject thereto I give, devise, and bequeath all my real and personal estate whatsoever and wheresoever unto Frederick Blasson Carritt absolutely. And I appoint the said Frederick Blasson Carritt sole executor of this my will."

The testator died in April, 1882, at Ghent, leaving personal

¹ Wallgrave *v.* Tebbs, 2 Kay & J. 313; Jones *v.* Badley, L. R. 3 Ch. App. 362; Juniper *v.* Batchelor, (1868) W. N. 197; Geddis *v.* Semple, [1903] 1 I. R. 73; Flood *v.* Ryan, 220 Pa. 450, *accord.* Gore *v.* Clarke, 37 S. C. 537 (bequest for uncommunicated purpose of giving testator's mistress and bastard children more than one-fourth of his estate in violation of a statute), *contra*.

For cases where the trust was agreed to by one only of several joint tenants or tenants in common, see Burney *v.* Macdonald, 15 Sim. 6; Russell *v.* Jackson, 10 Hare 204; Tee *v.* Ferris, 2 Kay & J. 357; Moss *v.* Cooper, 1 J. & H. 352; *In re* Stead, [1900] 1 Ch. 237; Hooker *v.* Axford, 33 Mich. 453; Powell *v.* Yearance, 73 N. J. Eq. 117; Amherst College *v.* Ritch, 151 N. Y. 282; Edson *v.* Bartow, 154 N. Y. 199, 215; Winder *v.* Scholey, 83 Oh. St. 204.

For cases in which the testator or intestate communicated to one other than the devisee legatee or heir his intention to create a trust, see Simons *v.* Bedell, 122 Cal. 341; Mead *v.* Robertson, 131 Mo. App. 185; Stirk's Estate, 232 Pa. 98.

property only. Immediately after his death probate was granted to Mr. Carritt. Thereupon the Plaintiff, John F. Boyes, one of the brothers and next of kin of the testator, instituted proceedings in the Probate Division of the High Court to recall probate. Mr. Carritt, who was the Defendant in that action, was the solicitor and a private friend of the testator, and had himself prepared the will, and in answer to interrogatories administered to him in the probate action, Mr. Carritt stated as follows: That the testator communicated his intentions to him at the time when he made his will (which was made in London), and that such intentions were that the Defendant should take the property as trustee upon trust to deal with it according to further directions, which the testator was to give by letter after his arrival on the Continent, whither he was then going within a day or two; and that he (Mr. Carritt) accepted the trust. That the deceased did go to the Continent within a day or two, but never gave any further directions in his lifetime. Upon receiving this answer the validity of the will was admitted, and the action to recall probate was discontinued.

This action was shortly afterwards brought by the next of kin of the testator against Mr. Carritt in order to obtain a declaration that they were beneficially entitled to his personal estate.

In his defence, Mr. Carritt said that in giving the instructions the testator expressed to him verbally his desire to provide for a certain lady and child, whose names he did not wish to appear in his will, and he therefore desired to leave the whole of his property to the Defendant as trustee to act with respect thereto according to any further written directions which might be given to him.

In his oral evidence in this action the Defendant confirmed these statements as accurately representing what he believed at the time, and said: "I gathered that I was to dispose of the estate as Mr. Boyes would direct me — the word 'trustee' was never used — the understanding was that he was to write to me, and I was to comply with his directions."

No such directions were ever in fact given by the testator to Mr. Carritt in his lifetime, but after his death there were found among his papers two letters, one dated the 10th of February, 1880 (which was proved to be a mistake for 1881), written at Antwerp, and which was in these words: —

"F. B. Carritt, Esq.

"I wish you to have five and twenty pounds of any property of which I may die possessed for the purchase of any trinket *in memoriam*, everything else I give to Nell Brown, formerly Sears, and I appoint you sole trustee to act at your discretion.

"G. E. Boyes."

The other letter was in these terms: —

"4th June, 1881.

"F. B. Carritt, Esq.

"Dear Sir, — In case of my death I wish Nell Brown to have all except twenty-five pounds in my memory.

"G. E. Boyes."

Neither of these letters was executed as a testamentary instrument.

Mrs. Brown was examined in this action, and she stated that the testator told her that he had written two letters to Mr. Carritt, one in case the other was lost. He directed her in case of his death to send immediately for Mr. Carritt. She did so, and having found these two letters among his papers, she placed them in Mr. Carritt's hands shortly after the testator's death.

Rigby, Q. C., and *Phillimore*, Q. C., for the Plaintiffs. A trust the object of which is not communicated to the trustee during the lifetime of the testator is not effectual, and as the Defendant Carritt has admitted himself to be a trustee, and does not set up any pecuniary interest (so that there is no room for fraud), he must (this being personal estate) be a trustee for the next of kin of the testator.

Hastings, Q. C., and *Oswald*, for the Defendant. We claim to hold the testator's property as trustee for Mrs. Brown, in accordance with the directions contained in the letters. They referred to *Wallgrave v. Tebbs*, 2 K. & J. 313; *McCormick v. Grogan*, Law Rep. 4 H. L. 82, and *In re Fleetwood*, 15 Ch. D. 594.

Simmonds, for Mrs. Brown. The trust in favour of Mrs. Brown is completely constituted. The subject was defined by the will, the object was defined by the letters, and there has been transfer of the property to the trustee and acceptance by him: *Jarman on Wills*, 4th Ed. vol. i., p. 395; *Fenton v. Hankins*, 9 W. R. 300. The communication to the trustee of the object of the trust may be after the date of the will:

Moss v. Cooper, 1 J. & H. 352; *McCormick v. Grogan*. In *Norris v. Frazer*, Law Rep. 15 Eq. 318, the object of the trust was not communicated until the death-bed of the testator. The trustee need not know the exact trust on which he is to take the property: and if the trust is complete the fact that the object of it was not communicated to the trustee until after the testator's death, will not destroy the trust: *Donaldson v. Donaldson*, Kay, 711; *Re Ways' Trusts*, 2 D. J. & S. 365. Otherwise a mere accident, such as a neglect to post a letter or a delay in its delivery, might vitiate a trust for the constitution of which everything possible had been done by the settlor.

[He also referred to *Pring v. Pring*, 2 Vern. 99.]

Rigby, in reply. The doctrine of *Moss v. Cooper* is this. If a man who is expecting to get an advantage under a will allows the testator to believe that he will carry out the instructions the testator has communicated to him, the person in whose favour the trust is declared has a personal equity against that man to oblige him to carry out the trust. But no trust of which he has never heard can be fastened upon his conscience. The true principle is that the object of the trust must be communicated to the trustee by the testator in his lifetime. Otherwise the trust is not binding, and this for two reasons. First, until the communication is complete, it can be modified by the testator, and so is ambulatory and no trust at all, while after the death the testator is no longer owner of the property. Secondly, unless the testator communicates it in his lifetime he is reserving to himself the power of making nuncupative and informal wills from time to time, and so of repealing the statutes.

KAY, J. As the point is a new one, I shall reserve my judgment.

March 29. KAY, J. (after stating the facts of the case, continued). The result of this is that Mr. Carritt admits that he is a trustee of all the property given to him by the will. He desires to carry out the wishes of the testator as expressed in the two letters, but of course he can only do so if they constitute a binding trust as against the next of kin.

If it had been expressed on the face of the will that the Defendant was a trustee, but the trusts were not thereby declared, it is quite clear that no trust afterwards declared by

a paper not executed as a will could be binding: *Johnson v. Ball*, 5 De G. & Sm. 85; *Briggs v. Penny*, 3 Mac. & G. 546; *Singleton v. Tomlinson*, 3 App. Cas. 404. In such a case the legatee would be trustee for the next of kin.

There is another well-known class of cases where no trust appears on the face of the will, but the testator has been induced to make the will, or, having made it, has been induced not to revoke it by a promise on the part of the devisee or legatee to deal with the property, or some part of it in a specified manner. In these cases the Court has compelled discovery and performance of the promise, treating it as a trust binding the conscience of the donee, on the ground that otherwise a fraud would be committed, because it is to be presumed that if it had not been for such promise the testator would not have made or would have revoked the gift. The principle of these decisions is precisely the same as in the case of an heir who has induced a testator not to make a will devising the estate away from him by a promise that if the estate were allowed to descend he would make a certain provision out of it for a named person: *Stickland v. Aldridge*, 9 Ves. 516; *Wallgrave v. Tebbs*, 2 K. & J. 313; *McCormick v. Grogan*, Law Rep. 4 H. L. 82. But no case has ever yet decided that a testator can by imposing a trust upon his devisee or legatee, the objects of which he does not communicate to him, enable himself to evade the Statute of Wills by declaring those objects in an unattested paper found after his death.

The essence of all those decisions is that the devisee or legatee accepts a particular trust which thereupon becomes binding upon him, and which it would be a fraud in him not to carry into effect.

If the trust was not declared when the will was made, it is essential in order to make it binding, that it should be communicated to the devisee or legatee in the testator's lifetime and that he should accept that particular trust. It may possibly be that he would be bound if the trust had been put in writing and placed in his hands in a sealed envelope, and he had engaged that he would hold the property given to him by the will upon the trust so declared although he did not know the actual terms of the trust: *McCormick v. Grogan*. But the reason is that it must be assumed if he had not so accepted the will would be revoked. Suppose the case of an engagement to hold the property not upon the terms of any paper

communicated to the legatee or put into his hands, but of any paper that might be found after the testator's death.

The evidence in this case does not amount to that, but if it did the rule of law would intervene, which prevents a testator from declaring trusts in such a manner by a paper which was not executed as a will or codicil. The legatee might be a trustee, but the trust declared by such an unattested paper would not be good. For this purpose there is no difference whether the devisee or legatee is declared to be a trustee on the face of the will, or by an engagement with the testator not appearing on the will. The devisee or legatee cannot by accepting an indefinite trust enable the testator to make an unattested codicil.

I cannot help regretting that the testator's intention of bounty should fail by reason of an informality of this kind, but in my opinion it would be a serious innovation upon the law relating to testamentary instruments if this were to be established as a trust in her favour.

The Defendant, however, having admitted that he is only a trustee, I must hold, on the authority of *Muckleston v. Brown*, 6 Ves. 52; *Briggs v. Penny*, 3 Mac. & G. 546; and *Johnson v. Ball*, 5 De G. & Sm. 85, that he is a trustee of this property for the next of kin of the testator. I can only hope they will consider the claim which this lady has upon their generosity.¹

ANONYMOUS.

CHANCERY. 1720.

Com. 345

A MAN seised in fee made a settlement of lands to trustees and their heirs, upon trust that they should sell the lands and pay out of the money arising therefrom such particular sums to such particular persons, and the residue (after the

¹ The agreement need not be made at the time the will is made; if the agreement induces the testator not to revoke his will previously made, that is sufficient. *Moss v. Cooper*, 1 J. & H. 352; *Konis v. Frazer*, L. R. 15 Eq. 318; *McCormick v. Grogan*, L. R. 4 H. L. 97 (*semble*); *French v. French*, [1902] 1 I. R. 172, 230; *Shields v. McAuley*, 37 Fed. 302; *Dowd v. Tucker*, 41 Conn. 197; *Ragsdale v. Ragsdale*, 68 Miss. 92; *Bellnap v. Tillotson*, 82 N. J. Eq. 271; *Rutherford v. Carpenter*, 134 N. Y. App. Div. 881; *Hoffner's Estate*, 104 Pa. 609; *Brook v. Chappell*, 34 Wis. 405. But see *Fox v. Fox*, 88 Pa. 19.

sum of 200*l.* to be paid to such person as he by any writing under his hand should direct) to B. his executors or administrators, and afterwards died without any direction for the payment of the 200*l.* It was resolved that B. should not have the 200*l.* but the heir of him who made the settlement.

WELFORD *v.* STOKOE.

CHANCERY. 1867.

(1867) W. N. 208

THIS WAS a suit for the execution of the trusts of the will of George Simpson, made in 1861, whereby, after making several specific devises, he devised and bequeathed the residue of his real estate to "his trustees and executors thereafter named, the survivor or survivors of them, upon trust to sell and convert into money the whole thereof, and invest the produce in their joint names in the public funds, receive the interest and dividends, and divide the same in the following proportions for an equal benefit," and he appointed T. W. Welford and B. Walker, trustees and executors.

Glasse, Q. C., and *C. Hall*, for the plaintiff, T. W. Welford, and *Whitehouse*, for B. Walker, contended, that the trustees and executors took the beneficial interest in the residuary estate.

Faber, for the next of kin, and *Chitty*, for the heir-at-law, contended that there was an intestacy as to the beneficial interest.

The VICE-CHANCELLOR [SIR R. MALINS] held that the testator had affixed a trust upon the residuary estate, without specifying the objects of the trust, and consequently there was a resulting trust, as to the real estate for the heir, and as to the personalty for the next of kin.

In re DAVIDSON.

MINTY *v.* BOURNE.

COURT OF APPEAL. 1908.

[1909] 1 Ch. 587.

APPEAL from a decision of SWINFEN EADY, J.

Henry Davidson by his will, dated July 14, 1903, after making a bequest of his jewellery, furniture, and all other articles

of personal, domestic, or household use or ornament, and his wines and consumable provisions, and giving two legacies of 100*l.* each to his executors, devised and bequeathed his residuary personal estate and his real estate upon trust for sale and conversion and for payment thereof of his funeral and testamentary expenses and the legacies thereinbefore bequeathed, and, subject thereto, upon trust to pay certain charitable legacies, including a legacy of 4000*l.* to the Roman Catholic Archbishop of Westminster for the time being, to be expended in such manner as he might think proper upon the altar or the ornaments of the same or round about the altar in the chapel of the Blessed Virgin Mary in the Roman Catholic Cathedral then in course of erection at Westminster; and he directed his trustees to hold the residue of his real and personal estate and the proceeds thereof "In trust for the said Roman Catholic Archbishop of Westminster for the time being to be distributed and given by him at his absolute discretion between such charitable religious or other societies institutions' persons or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit." The testator died on February 27, 1907.

The executors and trustees of the will took out an originating summons against the Roman Catholic Archbishop and the next of kin of the testator to determine whether the residuary gift was a good charitable bequest or was void for uncertainty.

SWINFEN EADY, J., held that the gift was void for uncertainty.

The Archbishop of Westminster appealed.

COZENS-HARDY, M. R.¹ This is an appeal from a decision of SWINFEN EADY, J., who has held that the gift of residue contained in the will of the testator is void for uncertainty. In my opinion it is impossible for us to differ from his decision. The will has the merit of brevity, and it is only necessary for the present purpose to refer to two clauses. First of all there is a gift to the Roman Catholic Archbishop of Westminster for the time being which is admittedly charitable; no question arises as to that. Then there is a gift of residue "in trust for the said Roman Catholic Archbishop of Westminster for the time being" — pausing there, that means the Archbishop at the time of the testator's death — "to be distributed and

¹ Concurring opinions of Farwell and Kennedy, L. JJ., are omitted.

given by him at his absolute discretion between such charitable religious or other societies institutions persons or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit." Stress has been laid — particularly by Mr. Hartree in his very able argument — upon the fact that the Roman Catholic Archbishop is the trustee who is to distribute this fund, and it is said that that fact alone is sufficient to shew that the whole purpose is charitable. I am unable to accept that view. I do not doubt that, if you find in a will words indicating that a distribution is to be made by persons in succession as holders of a particular religious or charitable office, that goes far to establish — and, it may be, goes sufficiently far to establish — the fact that the whole gift is charitable. But the mere fact that the trustee is a person holding a religious office, or is the head of a charitable institution or even an incorporated charitable institution, is not in any way sufficient to enable the Court to hold that all the trusts and purposes are charitable in the view of the law. I therefore do not think that it is sufficient for the appellant's argument to say that the Roman Catholic Archbishop of Westminster is the trustee. The decision of FARWELL, J., in *In re Delany*, [1902] 2 Ch. 642, which was relied upon on behalf of the appellant, so far from being an authority in support of that proposition, seems to me, when carefully considered, to be an authority in the contrary sense.

But then it is said that the objects in whose favour the Roman Catholic Archbishop is directed to distribute this residue are objects in connection with the Roman Catholic faith in England, and we are asked to hold that that is an overriding intent which ought to have effect so given to it as to modify the natural meaning of the prior words and induce us to construe them in a sense more restricted and narrow than we otherwise should. In the first place I do not think that the words "in connection with the Roman Catholic faith" mean anything else than in connection with the Roman Catholic Church, the Roman Catholic body, the Roman Catholic denomination, or whatever collocation of words you might use. But then it is said that if you find in the gift the words "the Roman Catholic faith" you must assume that all the other words are to be so read as that if they are connected with the Roman Catholic faith they must also be charitable. It is not without regret, if I may say so, that I do not feel

able to assent to that view, because in the language of this will there is an express direction that the residue may be distributed at the trustee's absolute discretion "between such charitable religious or other societies institutions persons or objects in connection with the Roman Catholic faith in England as he shall in his absolute discretion think fit." In the face of those words it does seem to me impossible to say that it is not competent to the trustee, according to the express terms of this will, to apply the residue to societies, institutions, persons, or objects which are neither charitable nor religious. If that is so, there is an end of the case.

I think that we are dealing here with what is very old and very well established law. The leading authority which is cited in all these cases is *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 522. That has been upheld in the House of Lords in *Hunter v. Attorney-General*, [1899] A. C. 309. I will read one passage only from the judgment of LORD DAVEY, *Ibid.* 324: "As Sir William Grant says in *Morice v. Bishop of Durham*, 9 Ves. 399, 406; 10 Ves. 522: 'The question is not whether the trustee may not apply it upon purposes strictly charitable, but whether he is bound so to apply it?'" Then LORD DAVEY proceeds: "The answer to that question in the present case can only be that there is no such obligation. On the other hand, the other purposes to which conceivably the trustees may apply the whole fund in their discretion are not described with sufficient definiteness for the Court to attach any trust upon them." In the present case the testator has created a trust, but has not indicated any body of beneficiaries, any *cestuis que trust*, who can invoke the aid of the Court and prevent the trustee from doing that which some trustees might do if there were no Court to call them in question, namely, put the money in their own pockets. Of course I do not suggest for a moment that the Archbishop would do that. But one cannot have regard to the circumstances of the particular individual. The law is perfectly well established that the Court cannot recognize a trust which is so uncertain that there is no known means by which the trustee can be compelled to distribute that fund. For these reasons I think that the judgment of SWINFEN EADY, J., is correct and that this appeal must be dismissed.¹

¹ *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 521; *Blair v. Duncan*, [1902] A. C. 37; *Nichols v. Allen*, 130 Mass. 211, *accord*.

OLLIFFE AND ANOTHER *v.* WELLS, EXECUTOR.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1881.

130 MASS. 221.

BILL IN EQUITY, filed December 11, 1877, alleging that the plaintiffs were the heirs at law and next of kin of Ellen Donovan, who died in Boston on May 23, 1877, and whose will, which was duly admitted to probate, after giving various legacies, contained the following clause: "13th. To the Rev. Eleazer M. P. Wells, all the rest and residue of my estate, to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him;" and nominated said Wells to be the executor.

The bill further alleged that Wells, who had been appointed executor by the Probate Court, claimed the right, after payment of the legacies, to dispose of the residue of the estate according to his own pleasure and discretion, and contended that he had received directions from Ellen Donovan as to the disposition of said residue; whereas, as the bill charged, the legacy of the residue of the estate had lapsed, and said residue should be distributed among the heirs at law and next of kin of the testatrix.

The bill prayed for a discovery, an account, an order for payment of the residue to the plaintiffs, a temporary injunction against distributing the residue of the estate, and for further relief.

The answer admitted the making of the will and the appointment of the defendant as executor; left the plaintiffs to prove whether they were the heirs at law and next of kin of the testatrix; and averred that the testatrix, before and at the time of and after the execution of the will, orally expressed and made known to the defendant her wish and intention that the rest and residue of her estate should be disposed of and distributed by the defendant, as executor of her will, for charitable purposes and uses, according to his discretion and judgment, and directed the defendant so to dispose of and distribute the said rest and residue; especially expressing to the defendant her desire that the poor, aged and infirm, and the children and others in need, and worthy of charity and assistance, under the care of or connected with Saint Stephen's

Mission, of Boston, and other deserving friends and deserving poor, should be aided and assisted out of said rest and residue, if the defendant in his discretion should see fit so to do; that the defendant desired and intended, unless otherwise ordered by the court, to dispose of and distribute the said rest and residue for charitable purposes and uses, according to his discretion, and especially for the benefit of the deserving poor, aged and infirm, and the children and others in need and worthy of charity and assistance, under the care of or connected with said Saint Stephen's Mission, and other deserving friends and deserving poor, as requested and directed by the testatrix; and that the testatrix, except by her will, gave to the defendant no written direction, wish or order as to the distribution of the residue of her estate remaining after the payment of the legacies.

The case was heard by COLT, J., and reserved for the consideration of the full court, on the bill and answer, and an agreement of the parties that the facts alleged in the answer should be taken as true. If these facts did not show a defence to the bill, the case was to be sent to a master, to determine whether the plaintiffs were the heirs and next of kin of the testatrix, and the amount of the residue of the estate; otherwise, the bill to be dismissed.

GRAY, C. J. Upon the face of this will the residuary bequest to the defendant gives him no beneficial interest. It expressly requires him to distribute all the property bequeathed to him, giving him no discretion upon the question whether he shall or shall not distribute it, or shall or shall not carry out the intentions of the testatrix, but allowing him a discretionary authority as to the manner only in which the property shall be distributed pursuant to her intentions. The will declares a trust too indefinite to be carried out, and the next of kin of the testatrix must take by way of resulting trust, unless the facts agreed show such a trust for the benefit of others as the court can execute. *Nichols v. Allen, ante*, 211. No other written instrument was signed by the testatrix, and made part of the will by reference, as in *Newton v. Seaman's Friend Society, ante*, 91.

The decision of the case therefore depends upon the effect of the fact, stated in the defendant's answer, and admitted by the plaintiffs to be true, that the testatrix, before and at the time of and after the execution of the will, orally made known

to the defendant her wish and intention that the residue should be disposed of and distributed by him as executor of her will for charitable uses and purposes, according to his discretion and judgment, and directed him so to dispose of and distribute it, especially expressing her desire as to the objects to be preferred, all which objects, taking the whole direction together, may be assumed to be charitable in the legal sense.

In any view of the authorities it is quite clear, and is hardly denied by the defendant's counsel, that intentions not formed by the testatrix and communicated to the defendant before the making of the will could not have any effect against her next of kin. *Thayer v. Wellington*, 9 Allen, 283. *Johnson v. Ball*, 5 De Gex & Sm. 85. *Moss v. Cooper*, 1 Johns. & Hem. 352. But assuming, as the defendant contends, that all the directions of the testatrix set forth in the answer are to be taken as having been orally communicated to the defendant and assented to by him before the execution of the will, we are of opinion that the result must be the same.

It has been held in England and in other States, although the question has never arisen in this Commonwealth, that, if a person procures an absolute devise or bequest to himself by orally promising the testator that he will convey the property to or hold it for the benefit of third persons, and afterwards refuses to perform his promise, a trust arises out of the confidence reposed in him by the testator and of his own fraud, which a court of equity, upon clear and satisfactory proof of the facts, will enforce against him at the suit of such third persons. *Chamberlaine v. Chamberlaine*, 2 Freem. 34. *Reech v. Kennegal*, 1 Ves. Sen. 123, 125; S. C. Ambl. 67; 1 Wils. 227. *Stickland v. Aldridge*, 9 Ves. 516, 519. *Jones v. Badley*, L. R. 3 Ch. 362, 364. *McCormick v. Grogan*, L. R. 4 H. L. 82, 88, 97. *Owings's case*, 1 Bland, 370, 402. *Hoge v. Hoge*, 1 Watts, 163, 214-216. *Church v. Ruland*, 64 Penn. St. 432. *Williams v. Fitch*, 18 N. Y. 546. *McLellan v. McLean*, 2 Head, 684. *Barrell v. Hanrick*, 42 Ala. 60. *Hooker v. Axford*, 33 Mich. 453. *Dowd v. Tucker*, 41 Conn. 197. *Williams v. Vreeland*, 5 Stew. (N. J.) 135, 734. See also *Glass v. Hulbert*, 102 Mass. 24, 39, 40; *Campbell v. Brown*, 129 Mass. 23, 26.

Upon like grounds, it has been held in England that, if a testator devises or bequeaths property to his executors upon trusts not defined in the will, but which, as he states in the

will, he has communicated to them before its execution, such trusts, if for lawful purposes, may be proved by the admission of the executors, or by oral evidence, and enforced against them. *Crook v. Brooking*, 2 Vern. 50, 106. *Pring v. Pring*, 2 Vern. 99. *Smith v. Attersoll*, 1 Russ. 266. And in two or three comparatively recent cases it has been held that such trusts may be enforced against the heirs or next of kin of the testator, as well as against the devisee. *SHADWELL*, V. C., in *Podmore v. Gunning*, 5 Sim. 485, and 7 Sim. 644. *CHATTERTON*, V. C., in *Riordan v. Banon*, Ir. R. 10 Eq. 469. *HALL*, V. C., in *Fleetwood's case*, 15 Ch. D. 594. But these cases appear to us to have overlooked or disregarded a fundamental distinction.

Where a trust not declared in the will is established by a court of chancery against the devisee, it is by reason of the obligation resting upon the conscience of the devisee, and not as a valid testamentary disposition by the deceased. *Cullen v. Attorney General*, L. R. 1 H. L. 190. Where the bequest is outright upon its face, the setting up of a trust, while it diminishes the right of the devisee, does not impair any right of the heirs or next of kin, in any aspect of the case; for if the trust were not set up, the whole property would go to the devisee by force of the devise; if the trust set up is a lawful one, it enures to the benefit of the *cestuis que trust*; and if the trust set up is unlawful, the heirs or next of kin take by way of resulting trust. *Boson v. Statham*, 1 Eden, 508; S. C. 1 Cox Ch. 16. *Russell v. Jackson*, 10 Hare, 204. *Wallgrave v. Tebbs*, 2 K. & J. 313.

Where the bequest is declared upon its face to be upon such trusts as the testator has otherwise signified to the devisee, it is equally clear that the devisee takes no beneficial interest; and, as between him and the beneficiaries intended, there is as much ground for establishing the trust as if the bequest to him were absolute on its face. But as between the devisee and the heirs or next of kin, the case stands differently. They are not excluded by the will itself. The will upon its face showing that the devisee takes the legal title only and not the beneficial interest, and the trust not being sufficiently defined by the will to take effect, the equitable interest goes, by way of resulting trust, to the heirs or next of kin, as property of the deceased, not disposed of by his will. *Sears v. Hardy*, 120 Mass. 524, 541, 542. They cannot be deprived

of that equitable interest, which accrues to them directly from the deceased, by any conduct of the devisee; nor by any intention of the deceased, unless signified in those forms which the law makes essential to every testamentary disposition. A trust not sufficiently declared on the face of the will cannot therefore be set up by extrinsic evidence to defeat the rights of the heirs at law or next of kin. See Lewin on Trusts (3d ed.) 75.

By the statutes of the Commonwealth, no will (with certain exceptions not material to be here stated) "shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same," unless signed by the testator and attested by three witnesses. Rev. Sts. c. 62, sec. 6. Gen. Sts. c. 92, sec. 6.

In *Thayer v. Wellington*, 9 Allen, 283, the testator by his will bequeathed to Hastings and Wellington \$15,000 "in trust to appropriate the same in such manner as I may by any instrument under my hand direct and appoint," and nominated Hastings executor, and made a residuary bequest to him in trust for the benefit of certain persons named. The testator also signed a paper, dated the same day as the will, referring to it, and addressed to Hastings and Wellington, directing them to pay over the \$15,000 to the city of Cambridge for the support of a public library; and they, after the death of the testator, signified in writing to the city their intention of so paying it when they should receive it from the executor. After the death of Hastings, upon a bill in equity by the administrator *de bonis non* for instructions, to which Wellington, the city, the *cestuis que trust*, and the heirs at law of the testator, were made parties, the court held that the clause in the will, the paper signed by the testator but not attested as required by the statute of wills, and the assent in writing of the trustees, gave the city no right to the fund; and that the heirs at law or next of kin would have been entitled to it, but for its being included in the residuary bequest.

It appears in the report on file, upon which that case was reserved for the determination of the full court, that an attorney at law testified that he drew up both the will and the paper at the request of Hastings, and delivered both drafts to him; and that Wellington testified that the paper was handed to him by Hastings after the testator's death. Those facts would, according to the cases of *Crook v. Brooking* and

Smith v. Attersoll, above cited, and which were relied on in the argument for the city of Cambridge, have been sufficient evidence of an assent by Hastings before the execution of the will, and, according to the decision of Vice Chancellor Wood in *Tee v. Ferris*, 2 K. & J. 357, would have entitled the city to enforce the trust against both trustees. Yet the court did not treat them as of any weight as between the surviving trustee and the city on the one hand, and the next of kin or the residuary legatees on the other, but merely observed that it did not appear at what time the paper was placed by the testator in the hands of Hastings. 9 Allen, 288.

*Decree for the plaintiffs.*¹

¹ *Wilcox v. Attorney General*, 207 Mass. 198; *Heidenheimer v. Bauman*, 84 Tex. 174; *Sims v. Sims*, 94 Va. 580, *accord*. Compare *In re Hetley* [1902] 2 Ch. 866.

In re Fleetwood, 15 Ch. D. 594; *In re Huxtable*, [1902] 2 Ch. 793; *In re Gardom*, [1914] 1 Ch. 662 (reversed by the Court of Appeal for failure of proof); *Riordan v. Banon*, 1 I. R. 10 Eq. 469; *Morrison v. M'Ferran*, [1901] 1 I. R. 360; *Curdy v. Berton*, 79 Cal. 420; *Cagney v. O'Brien*, 83 Ill. 72, *contra*.

In the following cases where the existence of the trust was, but its terms were not, disclosed on the face of the will, and no communication of the existence or of the terms of the trust was made to the devisee or legatee in the lifetime of the testator, the devisee or legatee was compelled to hold on a constructive trust for the residuary devisee or legatee or heir or next of kin. *Bryan v. Bigelow*, 77 Conn. 604, 616; *Saylor v. Plaine*, 31 Md. 158.

In the following cases where the existence of the trust was, but its terms were not, disclosed on the face of the will, and the existence was, but the terms were not, communicated to the devisee or legatee in the lifetime of the testator, a constructive trust for the residuary devisee or legatee or heir or next of kin was imposed. *In re King's Estate*, 21 L. R. Ir. 273; *Balfe v. Halpenny*, [1904] 1 I. R. 486. But in *Morrison v. M'Ferren*, [1901] 1 I. R. 360, it was held enough to prevent such a trust that the legatee agreed to hold for the objects named in a paper, then existent and signed by the legatee, although its contents were not known to the legatee.

In *Johnson v. Ball*, 5 De G. & Sm. 85, and in *Scott v. Brownrigg*, 9 L. R. Ir. 246, it was held that a communication to the devisee or legatee of the terms of the trust after the making of the will is insufficient. See *In re Gardom*, [1914] 1 Ch. 662. But compare the cases cited *supra* p. 441, in which the devise or bequest was absolute on its face.

On the subject of the incorporation in a will of an unattested instrument by reference in the will to the instrument, see *Magnus v. Magnus*, 80 N. J. Eq. 346; 4 Gray, *Cases on Property*, 2d ed., 99-145.

RIGGS, AS GUARDIAN *ad Litem*, *et al.*, APPELLANTS
v. PALMER *et al.*, RESPONDENTS.

COURT OF APPEALS, NEW YORK. 1889.

115 N. Y. 506.

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 5, 1887, which affirmed a judgment dismissing the complaint entered upon the report of a referee.

This action was brought to have the will of Francis B. Palmer, deceased, so far as it devises and bequeaths property to Elmer E. Palmer, canceled and annulled.

The facts are sufficiently stated in the opinion.

EARL, J. On the 13th day of August 1880, Francis B. Palmer made his last will and testament, in which he gave small legacies to his two daughters, Mrs. Riggs and Mrs. Preston, the plaintiffs in this action, and the remainder of his estate to his grandson, the defendant, Elmer E. Palmer, subject to the support of Susan Palmer, his mother, with a gift over to the two daughters, subject to the support of Mrs. Palmer, in case Elmer should survive him and die under age, unmarried and without any issue. The testator at the date of his will owned a farm and considerable personal property. He was a widower, and thereafter, in March 1882, he was married to Mrs. Bresee, with whom before his marriage he entered into an ante-nuptial contract in which it was agreed that, in lieu of dower and all other claims upon his estate in case she survived him, she should have her support upon his farm during her life, and such support was expressly charged upon the farm. At the date of the will, and subsequently to the death of the testator, Elmer lived with him as a member of his family, and at his death was sixteen years old. He knew of the provisions made in his favor in the will, and, that he might prevent his grandfather from revoking such provisions, which he had manifested some intention to do, and to obtain the speedy enjoyment and immediate possession of his property, he willfully murdered him by poisoning him. He now claims the property, and the sole question for our determination is, can he have it? The defendants say that the testator is dead; that his will was made in due form and has been admitted to probate, and that, therefore, it must have effect according to the letter of the law.

It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer.

The purpose of those statutes was to enable testators to dispose of their estates to the objects of their bounty at death, and to carry into effect their final wishes legally expressed; and in considering and giving effect to them this purpose must be kept in view. It was the intention of the law-makers that the donees in a will should have the property given to them. But it never could have been their intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present to their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it. It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers. The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only, and this is called rational interpretation; and Rutherford, in his Institutes (p. 407), says: "When we make use of rational interpretation, sometimes we restrain the meaning of the writer so as to take in less, and sometimes we extend or enlarge his meaning so as to take in more than his words express."

Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for *qui hæret in litera, hæret in cortice*. In Bacon's Abridgment, Statutes I, 5; Puffendorf (book 5, chapter 12), Rutherford (pp. 422, 427), and in Smith's Commentaries (814), many cases are mentioned where it was held that matters embraced in the general words of statutes, nevertheless, were not within the statutes, because it could not have been the intention of the law-makers that they should be included. They were taken out of the statutes by an equitable construction, and it is said in Bacon: "By an equitable construction, a case not within the letter of the statute is sometimes holden to be

within the meaning, because it is within the mischief for which a remedy is provided. The reason for such construction is that the law-makers could not set down every case in express terms. In order to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law-maker present, and that you have asked him this question, did you intend to comprehend this case? Then you must give yourself such answer as you imagine he, being an upright and reasonable man, would have given. If this be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for while you do no more than he would have done, you do not act contrary to the statute, but in conformity thereto." In some cases the letter of a legislative act is restrained by an equitable construction; in others it is enlarged; in others the construction is contrary to the letter. The equitable construction which restrains the letter of a statute is defined by Aristotle, as frequently quoted, in this manner: *Aequitas est correctio legis generaliter latae qua parti deficit*. If the law-makers could, as to this case, be consulted, would they say that they intended by their general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property? In 1 Blackstone's Commentaries (91) the learned author, speaking of the construction of statutes, says: "If there arise out of them any absurd consequences manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. . . . When some collateral matter arises out of the general words, and happen to be unreasonable, then the judges are in decency to conclude that the consequence was not foreseen by the parliament, and, therefore, they are at liberty to expound the statute by equity and only *quoad hoc* disregard it;" and he gives as an illustration, if an act of parliament gives a man power to try all causes that arise within his manor of Dale, yet, if a cause should arise in which he himself is party, the act is construed not to extend to that because it is unreasonable that any man should determine his own quarrel.

There was a statute in Bologna that whoever drew blood in the streets should be severely punished, and yet it was held not to apply to the case of a barber who opened a vein in the street. It is commanded in the Decalogue that no work shall be done upon the Sabbath, and yet, giving the command a

rational interpretation founded upon its design, the Infalible Judge held that it did not prohibit works of necessity, charity or benevolence on that day.

What could be more unreasonable than to suppose that it was the legislative intention in the general laws passed for the orderly, peaceable and just devolution of property, that they should have operation in favor of one who murdered his ancestor that he might speedily come into the possession of his estate? Such an intention is inconceivable. We need not, therefore, be much troubled by the general language contained in the laws.

Besides, all laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. They were applied in the decision of the case of the New York Mutual Life Insurance Company v. Armstrong, 117 U. S. 591. There it was held that the person who procured a policy upon the life of another, payable at his death, and then murdered the assured to make the policy payable, could not recover thereon. Mr. Justice FIELD, writing the opinion, said: "Independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired."

These maxims, without any statute giving them force or operation, frequently control the effect and nullify the language of wills. A will procured by fraud and deception, like any other instrument, may be decreed void and set aside, and so a particular portion of a will may be excluded from probate or held inoperative if induced by the fraud or undue influence of the person in whose favor it is. *Allen v. M'Pherson*, 1 H. L. Cas. 191; *Harrison's Appeal*, 48 Conn. 202. So a will

may contain provisions which are immoral, irreligious or against public policy, and they will be held void.

Here there was no certainty that this murderer would survive the testator, or that the testator would not change his will, and there was no certainty that he would get this property if nature was allowed to take its course. He, therefore, murdered the testator expressly to vest himself with an estate. Under such circumstances, what law, human or divine, will allow him to take the estate and enjoy the fruits of his crime? The will spoke and became operative at the death of the testator. He caused that death, and thus by his crime made it speak and have operation. Shall it speak and operate in his favor? If he had met the testator and taken his property by force, he would have had no title to it. Shall he acquire title by murdering him? If he had gone to the testator's house and by force compelled him, or by fraud or undue influence had induced him to will him his property, the law would not allow him to hold it. But can he give effect and operation to a will by murder, and yet take the property? To answer these questions in the affirmative, it seems to me, would be a reproach to the jurisprudence of our state, and an offense against public policy.

Under the civil law evolved from the general principles of natural law and justice by many generations of juriconsults, philosophers and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered. Domat, part 2, book 1, tit. 1, sec. 3; Code Napoleon, sec. 727; Mackeldy's Roman Law, 530, 550. In the Civil Code of Lower Canada the provisions on the subject in the Code Napoleon have been substantially copied. But, so far as I can find, in no country where the common law prevails has it been deemed important to enact a law to provide for such a case. Our revisers and law-makers were familiar with the civil law, and they did not deem it important to incorporate into our statutes its provisions upon this subject. This is not a *casus omissus*. It was evidently supposed that the maxims of the common law were sufficient to regulate such a case and that a specific enactment for that purpose was not needed.

For the same reasons the defendant Palmer cannot take any of this property as heir. Just before the murder he was not an heir, and it was not certain that he ever would be. He

might have died before his grandfather, or might have been disinherited by him. He made himself an heir by the murder, and he seeks to take property as the fruit of his crime. What has before been said as to him as legatee applies to him with equal force as an heir. He cannot vest himself with title by crime.

My view of this case does not inflict upon Elmer any greater or other punishment for his crime than the law specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime, and thus be rewarded for its commission.

Our attention is called to *Owens v. Owens*, 100 N. C. 240, as a case quite like this. There a wife had been convicted of being an accessory before the fact to the murder of her husband, and it was held that she was, nevertheless, entitled to dower. I am unwilling to assent to the doctrine of that case. The statutes provide dower for a wife who has the misfortune to survive her husband and thus lose his support and protection. It is clear beyond their purpose to make provision for a wife who by her own crime makes herself a widow and willfully and intentionally deprives herself of the support and protection of her husband. As she might have died before him, and thus never have been his widow, she cannot by her crime vest herself with an estate. The principle which lies at the bottom of the maxim, *volenti non fit injuria*, should be applied to such a case, and a widow should not, for the purpose of acquiring, as such, property rights, be permitted to allege a widowhood which she has wickedly and intentionally created.

The facts found entitled the plaintiffs to the relief they seek. The error of the referee was in his conclusion of law. Instead of granting a new trial, therefore, I think the proper judgment upon the facts found should be ordered here. The facts have been passed upon twice with the same result, first upon the trial of Palmer for murder, and then by the referee in this action. We are, therefore, of opinion that the ends of justice do not require that they should again come in question.

The judgment of the General Term and that entered upon the report of the referee should, therefore, be reversed and judgment should be entered as follows: That Elmer E. Palmer and the administrator be enjoined from using any of the per-

sonalty or real estate left by the testator for Elmer's benefit; that the devise and bequest in the will to Elmer be declared ineffective to pass the title to him; that by reason of the crime of murder committed upon the grandfather he is deprived of any interest in the estate left by him; that the plaintiffs are the true owners of the real and personal estate left by the testator, subject to the charge in favor of Elmer's mother and the widow of the testator, under the ante-nuptial agreement, and that the plaintiffs have costs in all the courts against Elmer.

The judgment should be affirmed, with costs.

All concur with EARL, J., except GRAY, J., who reads dissenting opinion,¹ and DANFORTH, J., concurring.

*Judgment in accordance with the prevailing opinion.*²

¹ The dissenting opinion of Gray, J., is omitted.

² In *Ellerson v. Westcott*, 148 N. Y. 149, it was held that the devisee gets a legal title under the will and that the remedy of the heir is in equity.

In the following cases the slayer was precluded from taking or from keeping the property of his victim: *Estate of Hall*, [1914] P. 1 (legatee guilty of manslaughter); *Lundy v. Lundy*, 24 Can. Sup. Ct. 650 (devisee guilty of manslaughter); *Perry v. Strawbridge*, 209 Mo. 621 (husband, statutory heir, guilty of murder); *Box v. Lanier*, 112 Tenn. 393 (husband guilty of murder, precluded from taking wife's personalty. It was subsequently held that a husband who kills his wife does not forfeit his right as tenant by entireties. *Beddingfield v. Estill*, 118 Tenn. 39). See also *Estate of Crippen*, [1911] P. 108. Compare also the cases where the claimant under a life insurance policy killed the insured. *Cleaver v. Mutual Reserve Fund Life Ass.*, [1892] 1 Q. B. 147; *Supreme Lodge v. Menkhausen*, 209 Ill. 277; *Schmidt v. Northern Life Ass.*, 112 Iowa 45. See *Collins v. Metropolitan Life Ins. Co.*, 232 Ill. 37.

In the following cases the slayer was allowed to take and keep the property of his victim: *In re Houghton*, [1915] 2 Ch. 173 (ancestor killed by insane heir); *Wall v. Pfanschmidt*, 265 Ill. 180; *McAllister v. Fair*, 72 Kan. 533 (husband guilty of murder); *Gollnik v. Mengel*, 112 Minn. 349 (wife, statutory heir, guilty of manslaughter); *Shellenberger v. Ransom*, 41 Neb. 631, reversing s. c. 31 Neb. 61 (heir guilty of murder); *In re Wolf*, 88 N. Y. Misc. 433 (murder by husband who intended to kill another); *Estate of Fox*, 52 N. Y. L. J. 1115; *Owens v. Owens*, 100 N. C. 240 (wife guilty of murder not deprived of dower); *Carpenter's Estate*, 170 Pa. 203 (son guilty of murder); *Deem v. Millikin*, 6 Ohio C. C. 357, affirmed 53 Oh. St. 668 (son guilty of murder); *De Graffenreid v. Iowa Land & Trust Co.*, 20 Okla. 687 (murder by heir, motive not acquisition of property); *Holloway v. McCormick*, 41 Okla. 1 (like preceding case).

In a few states there are statutes dealing with the subject: Cal. Civ. Code, 1909 sec. 1409 (see *Estate of Kirby*, 162 Cal. 91); 2 Burns' Ann. Ind. Stat., 1914, sec. 2995 (see *Bruns v. Cope*, 105 N. E. 471); Iowa Code, Supp. 1913, sec. 3386; Tenn. Acts, 1905, c. 11. See also Ames, *Lectures on Legal History*, 310; 30 *Law Quarterly Review* 211.

SECTION IV.

Where the Purchase-Money is Paid by One Person and the Conveyance is Taken in the Name of Another.

ANONYMOUS.

CHANCERY. 1683.

2 Vent. 361.

WHERE a man buys land in another's name, and pays money, it will be in trust for him that pays the money, tho' no deed declaring the trust, for the Statute of 29 Car. 2. called the Statute of Frauds, doth not extend to trusts, raised by operation of the law.¹

¹ The doctrine is applicable to personal property. *James v. Holmes*, 4 De G. F. & J. 470; *In re Policy No. 6402*, [1902] 1 Ch. 282; *Briggs v. Sanford*, 219 Mass. 572.

In New York it is provided by statute (Real Property Law, sec. 94) that "A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands, but the title vests in the grantee, and no use or trust results from the payment to the person paying the consideration, or in his favor, unless the grantee either,

1. Takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration; or,

2. In violation of some trust, purchases the property so conveyed with money or property belonging to another." See *Angermiller v. Ewald*, 133 N. Y. App. Div. 691.

There are similar statutes in a few other states. See 1 Carroll's Ky. Stats., 1915, secs. 2353-4 (but it is held in Kentucky that the person who pays the purchase-money may recover the amount thereof from the person to whom the conveyance was made if a trust was in fact intended. See *Martin v. Martin*, 5 Bush. (Ky) 47; *Deposit Bank v. Rose*, 113 Ky. 946); 4 Howell's Mich. Stats., 2d ed., secs. 10675-7; Gen. Stats. Minn., 1913, secs. 6706-8; Wis. Stats., 1911, secs. 2077-9. In Indiana and Kansas a third exception is added: "Where it shall be made to appear that, by agreement and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase-money or some part thereof." 2 Burns' Ann. Ind. Stat., 1914, secs. 4017-9; Gen. Stat. Kan., 1909, secs. 9699-9701.

FROEMKE, APPELLEE *v.* MARKS, APPELLANT.

SUPREME COURT, ILLINOIS. 1913.

259 Ill. 146.

MR. JUSTICE DUNN delivered the opinion of the court.¹

This is an appeal from a decree requiring the appellant to convey to the appellee certain real estate in the city of Chicago.

Neither the pleadings nor the decree have been abstracted and we have before us only the evidence, from which it appears that the premises in question were purchased and the consideration therefor paid by the appellee, but at his request the title was conveyed to the appellant, who was the father-in-law of the appellee's brother, and who claims not to have known of the conveyance to him until some time after it was made. Under these circumstances a resulting trust arose in favor of the appellee. A trust results from the fact that one man's money has been invested in land and the title taken in the name of another. It is immaterial whether the purchase was made by the one or the other, and it may have been made by either without the knowledge of the other. If the fact exists that one man's money paid for the land and the title was taken in another, a trust is raised in favor of the person whose money was used to purchase the land. *Bruce v. Roney*, 18 Ill. 67; *Emmons v. Moore*, 85 id. 304; *Brennaman v. Schell*, 212 id. 356.

It appears that at the hearing a motion was made to file an amended answer. The nature of the amendment does not appear, but it is stated in the brief that it sought to set up the Statute of Frauds. It was not error to deny the motion, for the Statute of Frauds has no application to resulting trusts, but expressly provides, in section 9, "that resulting trusts or trusts created by construction, implication or operation of law, need not be in writing, and the same may be proved by parol." . . .

Decree affirmed.

¹ A part of the opinion is omitted.

MILLER *et al.*, DEFENDANTS IN ERROR, v. DAVIS,
PLAINTIFF IN ERROR.

SUPREME COURT, MISSOURI. 1872.

50 Mo. 572.

ADAMS, J.¹ delivered the opinion of the court. . . .

The facts stated in this petition are, substantially, that the defendant's father, under the laws of Congress, had entered all the forty-acre tracts of land he was entitled to enter, and, not being able to enter the forty acres in dispute in his own name, made the entry in the name of his infant son, the defendant. The petition then alleges that the father sold and conveyed this forty acres to the plaintiff, and asks a decree for the title to be divested out of the infant and invested in the plaintiffs.

It is a well-settled principle of equity jurisprudence that in general, when one person pays the purchase-money for land and the title is conveyed to another, a trust results in favor of the party who paid for the land. But where such purchase is made in fraud of an existing statute and in evasion of its express provisions, no trust can result in favor of the party who is guilty of the fraud. There is no pretense here that the plaintiffs are innocent purchasers. They make no such allegation in the petition. They occupy the precise relation to the defendant that was held by their assignor, and boldly assert that he, in order to obtain this tract of land from the United States, used the name of his infant son, because he could not make the entry in his own name, having already entered as many forty-acre tracts as he was entitled to by the laws of the United States. His act in making this entry was against public policy. Under the facts as stated in the petition, no trust resulted to the father; and as between him and his assignees and the son, a court of equity cannot disturb the title.

The judgment will therefore be reversed and the cause remanded.² Judge WAGNER concurs. Judge BLISS absent.

¹ A part of the opinion is omitted.

² See *Sell v. West*, 125 Mo. 621; *Proseus v. McIntyre*, 5 Barb. (N. Y.) 424. But see *Boggs v. Bright*, 222 Fed. 714; *Perkins v. Nichols*, 11 Allen (Mass.) 542; *Monahan v. Monahan*, 77 Vt. 133.

JOHN THOMAS *v.* AMIEE E. THOMAS AND JOSEPH
THOMAS, AN INFANT.

COURT OF CHANCERY, NEW JERSEY. 1911.

79 N. J. Eq. 461.

FINAL hearing on bill, answer, replication and proofs.

LEAMING, V. C. My views in this case are entirely defined; the arguments which have been made, and the references to authorities during the progress of the case, have sufficiently refreshed my memory of adjudications in cases of this class, to enable me, I think, to correctly dispose of the matter at this time without taking it under advisement.

There is no doubt touching the facts of the case. Under the evidence which has been received the facts are clearly and indubitably established. The only possible ground of opposition that can be made to the decree sought is necessarily based upon the claim that some of the evidence which has been received is not competent by reason of our statutes.

The evidence which has been offered and received under my rulings establishes beyond all doubt the fact that Mr. Thomas, Sr., purchased the land in question for his own benefit at sheriff's sale, paying \$21,400 for it with his own money. He took the title, however, in the name of his three sons, causing the sheriff to make a deed to them instead of to himself. By prior arrangements with his sons, he had procured from them their assent that he should do so, and their promise that at such time as he desired the property conveyed by them to him, they would execute the deeds. He accepted their assurance to that effect without any writing being executed, and trusted them with the legal title to the property, which, as already stated, he purchased for himself, and for his own use and benefit and paid for with his own funds. The evidence clearly discloses that no money was contributed by either of these sons, and that neither understood that the purchase was for their benefit, but that all three understood that the purchase was for the sole benefit of the father. The fact is that a reason existed, which Mr. Thomas, Sr., thought was a good reason, for putting the title in the names of his sons. He was living separate from his wife at the time, under an agreement of separation, and was expecting at the time that he would soon have occasion to sell a portion of the property

to an anticipated purchaser, and thought that by putting the title in the names of his sons, he would avoid any possibility of difficulty in getting his wife to sign the deed. Unfortunately, one of the sons has since died, leaving the legal title in his name, which legal title has descended to the son of that son, who is now a minor and a defendant in this suit. These facts, I say, are clearly established if the evidence which has been introduced is entitled to be considered. Under this testimony but one conclusion can result, and that is that the complainant is entitled to a decree establishing his title in this land. He is entitled to such decree as may be necessary to fully confirm his title, as he is undoubtedly the equitable owner, and is entitled to be restored to the status of a legal owner.

The objections to the admissibility of the testimony to which I have already referred, have been considered during the progress of the trial, and need not be here restated at any length.

The first objection is that the testimony of complainant touching conversations with his deceased son is incompetent because of the fact that there is before the court a defendant in a representative capacity. As stated, during the hearing, the case of *Cowdrey v. Cowdrey*, reported in 71 N. J. Eq. (1 Buch.) 353, fully meets that objection. There is no defendant before this court in a representative capacity within the meaning of the statute. The present suit is essentially a suit *in rem*, a suit purely for the restoration of legal title, and seeks no relief *in personam*. If it were true, however, that the complainant should be excluded from testifying to conversations between himself and his deceased son, the evidence would yet be ample to establish the facts which I have stated to exist, because the two remaining sons who are still alive have both testified to substantially the same conversations to which the father testified and have fully established the fact, and no objection can arise, so far as their testimony is concerned, based on the ground of a suit against a defendant in a representative capacity.

The other objection on which defendant relies is that the effect of the decree sought is to establish a trust in the deceased defendant, and that the statute of frauds prohibits the establishment of a trust in lands by parol testimony.

An examination of the statute of frauds will disclose that it is not so broad as the statement which I have just made.

The statute of frauds will not permit an express trust to be established by parol testimony, but, by its very terms, it excepts resulting trusts. The language of the statute is, as I recall it, that there is excepted from its operation trusts which arise from implications or construction of law. That may not be the language of the statute, but it is substantially the language. Such trusts are not within the statute, and the courts have uniformly held that parol testimony is competent to aid in their ascertainment. Therefore, if this case were a case in which Mr. Thomas, Sr., had caused a deed to be made to a stranger, the consideration having been supplied by Mr. Thomas, the presumption of law would be that the person who supplied the money had supplied it for his own benefit, and not for the benefit of the stranger, that the title follows the consideration, and in such a case the law creates and determines the existence of a resulting trust. That is what the statute refers to as a trust which results from implication or construction of the law, and is therefore one of the trusts which is excepted by the terms of statute. It follows in consequence that where money is supplied by one person to pay for property, the title to which is taken in the name of another, the law permits the person who supplies the money to testify that he supplied the money, and the trust results as a matter of law.

An additional element arises, however, when the conveyance, the consideration for which is paid for a father, is made to a son, daughter, wife or other near relative or dependent; the mere fact of supplying the consideration, in such a case, does not create a presumption of ownership in the person who supplies the consideration. On the contrary, the presumption is the reverse. The presumption in such a case is that the father supplies the consideration not for his own benefit but for the benefit of the relative; therefore, standing alone, the mere testimony on the part of the father or any other witness that the father supplied the money will not be sufficient to create a resulting trust, but, on the contrary, such testimony will create a presumptive gift, settlement or advancement. That presumption, however, is a rebuttable presumption; if the presumption of gift, settlement or advancement can be dispelled or overcome by competent evidence then the conveyance to the son stands exactly on the same plane as a conveyance to a stranger. So, the only real question here now is, whether or not the presumption of gift has been dispelled or

overcome by competent evidence. The courts have uniformly held that this presumption of gift, advancement or settlement is not only rebuttable, but it may be rebutted by any circumstance precedent to the transaction, or contemporaneous with the transaction, or so nearly contemporaneous with the transaction as to form part of the *res gestæ*, but that it cannot be rebutted by circumstances other than admission of the parties, subsequent thereto.

When conversations between the party who supplies the consideration, the father, and the party who receives the conveyance, the son, are sought to be introduced into evidence for the purpose of repelling the presumption of gift, the thought necessarily suggests itself that the effect of such testimony is to establish a trust. As such it would be incompetent, but it is competent to establish that it was not a gift, settlement or advancement. In other words, it is competent to repel or rebut the presumption of gift which the law has created, and it will be received for that purpose and for that purpose alone, and if, when received, it is adequate to fully dispel the presumption of settlement or advancement or gift, then the case stands exactly as it would stand in the case already suggested of a conveyance made to a stranger. In other words, the testimony in this case is competent for the purpose of establishing, and is ample in quality to establish, the fact that this conveyance was not by the father ordered made to these children as a gift, and the presumption of gift which arose from the relationship is dispelled by that evidence. That brings the case upon the same plane as a conveyance made to a stranger, by money supplied by the complainant, and in such case the law creates or presumes the trusts.

It follows that in this case, under the circumstances named, there is no course that can be properly adopted but to reach the conclusion, and make that conclusion effective through whatever decree is found necessary to answer the needs of the complainant, that this legal title, now in the name of the heirs of John Thomas, Jr., is held under a trust to reconvey, upon request, to John Thomas, Sr., and that the entire equitable title to the property is in John Thomas, Sr., and that he is entitled to have the legal title fully restored to him. I will advise a decree of that nature.¹

¹ Stock v. McAvoy, L. R. 15 Eq. 55; Smithsonian Institution v. Meech, 169 U. S. 398; McKey v. Cochran, 262 Ill. 376; Dodge v. Thomas, 266 Ill.

LONG v. MECHEM.

SUPREME COURT, ALABAMA. 1904.

142 Ala. 405.

SIMPSON, J. This is an appeal from an interlocutory decree, overruling demurrers and a plea.¹ The original bill was filed, to remove a cloud from the title of complainant, and was afterwards amended by adding a section, setting up a resulting trust, but making no additional prayer.

The first assignment of error is based on the overruling of the plea, the substance of the plea being that the trust set up in the amended bill was not in writing and consequently void under section 1041 of the Code of Alabama (1896).

The allegations of the amended bill show that the land, in question, was bought and paid for by the complainant, and the title taken in the name of one Duncan, under an agreement that Duncan was to hold the legal title for complainant, and to convey the land, whenever desired under complainant's direction.

The contention of the respondent is that the fact that there was a parol agreement in regard to said trust takes it out of the category of resulting trusts, and it is therefore void.

If the complainant had a resulting trust in the lands, from having paid the purchase money, and placed the title in the name of another, the mere fact that the party, in whom the legal title was vested recognized, by parol, the obligation to hold the land in trust, certainly could not destroy the result-

76 (*semble*); *Yetman v. Hedgeman*, 82 N. J. Eq. 221, *accord*. *Mullong v. Schneider*, 155 Iowa 12, *contra*. See also *Dyer v. Dyer*, 2 Cox 92; *Dumper v. Dumper*, 3 Giff. 583; *Mercier v. Mercier*, [1903] 2 Ch. 98; and a collection of cases in L. R. A. 1915 C, 1082.

So parol evidence of the intention of the real purchaser to benefit the nominal purchaser when the latter is a stranger is admissible to rebut the presumption of a resulting trust. *Fowkes v. Pascoe*, L. R. 10 Ch. 343 (personalty); *Wolters v. Shraft*, 69 N. J. Eq. 215, 70 N. J. Eq. 807; *Carter v. Montgomery*, 2 Tenn. Ch. 216. Compare *Ward v. Ward*, 59 Conn. 188. The resulting trust may be rebutted by parol evidence as to a part of the interest in the property; as for instance, it may be shown that after the death of the real purchaser the nominal purchaser was to have the beneficial interest. *Benbow v. Townsend*, 1 Myl. & K. 506; *Larisey v. Larisey*, 93 S. C. 450.

¹ Only the part of the opinion relating to the validity of the plea is here given.

ing trust held by the complainant, by operation of law. In addition to this, the section of the Code provides that no trust in lands, not in writing is valid "*except such as result by implication or construction of law, or which may be transferred or distinguished by operation of law.*"

The inevitable result from the grammatical construction of the sentence is that this class of trusts is excepted entirely from the operation of the section, and parol declarations of the parties regarding the same are admissible.

The distinction between this case and such cases as *Patton v. Beecher, et al.*, 62 Ala. 579, and *Brock v. Brock*, 90 Ala. 86, is that these cases correctly hold that the "*mere verbal promise, by the grantee of a deed for lands, absolute on its face*" will not take it out of the requirements of the statute, while this case comes under another principle of law, equally well established, and recognized in the exception contained in the statute under consideration, to wit; that "*if the purchaser of lands, paying the purchase money, takes the conveyance in the name of another, the trust of the lands results, by construction to him from whom the purchase money moves.*" — *Lehman, et al. v. Lewis*, 62 Ala. 129, 131; *Tillman v. Murrell, et al.*, 120 Ala. 239.

It is true that in the last named case, as counsel for appellant say, the lands had been conveyed in accordance with the parol agreement, but the case was decided distinctly on the principle that Murrell held the legal title in trust for the party who paid the money for it, "*not by virtue of the parol agreement, but because of their having paid the consideration.*"

There was no error in the decree of the court as to said plea.¹ . . .

In re DAVIS.

DISTRICT COURT OF THE UNITED STATES, DISTRICT
OF MASSACHUSETTS. 1901.

112 Fed. 129.

IN Bankruptcy. On petition for an order requiring the trustee to convey to the petitioner property claimed to have been held by the bankrupt in trust.

¹ See *Wilson v. Warner* (Conn., 1915), 93 Atl. 533; *Brenneman v. Schell*, 212 Ill. 356; *Linnell v. Hudson*, 59 S. C. 283.

The doctrine of a resulting trust in favor of the person paying the purchase money of an estate is stated in *Anonymous*, 2 Vent. 361 (in 1 Vern. 366, the case is named *Bird v. Blossie*):

“Where a man buys land in another’s name, and pays the money, it will be in trust for him that pays the money, though no deed declaring the trust, for the statute of 29 Car. II., called the ‘Statute of Frauds,’ doth not extend to trusts raised by operation of law.”

A century later Lord Chief Baron Eyre thus explained the doctrine in the opinion of the court of exchequer:

“The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive, — results to the man who advances the purchase money. This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law that, where a feoffment is made without consideration, the use results to the feoffor.” *Dyer v. Dyer*, 2 Cox, 92, 93, 1 White & T. Lead. Cas. Eq. 203, 205.

The trust is presumed to result from the circumstance of payment alone. It results, even if the grantee had no notice of the conveyance, and though he made no agreement, oral or written, to hold the estate in trust. To create the trust, there need be nothing savoring of fraud or misrepresentation or mistake. The trust is not fastened upon the conscience of the legal owner by any action or inaction of his. It arises, as is said in the statute of frauds, by operation of law. The trust may arise in an aliquot part of the property conveyed, or in an estate therein less than a fee simple. The nature and extent of the beneficial interest which passes to the person paying the purchase money may be shown by parol. The trust in favor of the purchaser which is presumed to result may itself be rebutted by parol.

The trust in favor of the grandchildren which was intended by Mrs. Sullivan is enforceable against Mrs. Davis or it is not. Let us suppose that it cannot be enforced. From the payment of the purchase money by Mrs. Sullivan a trust is presumed to result in her favor. How does the trustee in

bankruptcy of Mrs. Davis seek to rebut this presumption? Mrs. Davis is Mrs. Sullivan's daughter, and from some relations a rebutting counter presumption arises in favor of the grantee. It is doubtful, however, if this counter presumption arises from the relation of mother and daughter. See *Murphy v. Nathans*, 46 Pa. 508; *Sayre v. Hughes*, L. R. 5 Eq. 376; *Johnson v. Wyatt*, 2 De Gex, J. & S. 18; *Bennet v. Bennet*, 10 Ch. Div. 474; *In re Orme*, 50 Law T. (N. S.) 51. In any case the counter presumption in favor of a grantee who is the child of the purchaser, even where it exists, "is not a presumption of law, but of fact, and can be overthrown by proof of the real intent of the parties." *Institution v. Meech*, 169 U. S. 398, 407, 18 Sup. Ct. 396, 400, 42 L. Ed. 793, 798. "The circumstance of one or more of the nominees being a child or children of the purchaser is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee, being a child, shall have such operation as a circumstance of evidence, that we should be disturbing landmarks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence." "Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side." *Dyer v. Dyer*, above cited. As it is abundantly clear that Mrs. Davis was intended to take no beneficial interest in the estate, her relation to Mrs. Sullivan is unimportant, and the case must be decided as if she were a stranger in blood. The trustee thus stands in the place of a grantee who seeks to rebut the presumption that the trust results to the purchaser, and seeks to do so by showing that a trust was intended in favor of a third person, which trust is not enforceable against the grantee. The grantee thus claims the entire beneficial interest in the estate, of which she would otherwise have taken nothing, by showing that a beneficial interest was intended in some one else. She claims a beneficial interest in property because of the expressed intent that she should take no beneficial interest therein. If the purchaser had said nothing, the grantee would have taken nothing. Because the purchaser has said that the grantee is to take nothing, the grantee claims to take everything. This does not appear to be equitable. The intended beneficiaries, the grandchildren, are excluded by the terms of the supposition. As between the grantee and

sonian Institution should receive the land after the death of the survivor. The precise terms of the agreement, which was oral, were in doubt. Mrs. Avery died intestate before her husband. In its bill the complainant claimed equitable title to the land as the devisee of Mr. Avery, and the court decreed accordingly. There are expressions in the opinion which imply that the parol trust for the benefit of the Smithsonian Institution was valid and enforceable, but the general effect of the opinion is to rest the complainant's equitable title upon a resulting trust to Mr. Avery and his devise to the complainant. Upon the whole, also, the court seems to have considered that the parol trust was substantially identical with the resulting trust, and that the latter was not destroyed by the former. But it is clear that the court did not deem it important that the parol trust and the resulting trust should be identical, so long as it appeared clearly that Mrs. Avery was to take no beneficial interest in fee. If the trustee's contention in the case at bar be sound, then, in order to establish a resulting trust to Mr. Avery, the court must have been satisfied that the parol trust differed in no material respect from the resulting trust; for, had there been any material difference, the case would have been precisely like that at bar, and by the trustee's contention the court would have been required to hold that the resulting trust was defeated by a different parol trust, and that, as the parol trust failed for want of compliance with the statute of frauds, the entire beneficial interest passed to Mrs. Avery. As has been said, however, the supreme court appears to have deemed the identity of the parol trust and the resulting trust unimportant, and not to have rested the decision upon a supposed identity. In *Emmons v. Moore*, 85 Ill. 304, A. bought land, and had the conveyance made to B., his son. At the time of the purchase he expressed an intention to make by the purchase provision for another son, C. This intention was not communicated to B. until some time afterwards. The court held that B. took no beneficial interest, but held in trust for A. or C., it is not quite clear which. In *Titcomb v. Morrill*, 10 Allen, 15, it was held that a voluntary conveyance, absolute in form, though aided by an oral agreement to hold for the benefit of the grantor, raises no trust in his favor. This decision does not express the law of all the states. But the attempt of the grantor in *Titcomb v. Morrill* to set up a resulting trust in

the case of his own voluntary conveyance was there expressly distinguished from the case "where a purchase is made in the name of one person, and the purchase money is paid by another." 10 Allen, 18. In the somewhat analogous case of a will, it has been held that, if property is devised in trust for purposes expressed by parol, and the intended beneficiary cannot take because the statute of wills has not been complied with, yet the devisee does not take the beneficial interest, but there results a trust in favor of the testator's representatives. *Olliffe v. Wells*, 130 Mass. 221, and cases cited. It is true that, upon an unqualified devise to A. no trust was held to result, though the testator, by a letter communicated after his death to A., requested A. to apply the devise to a particular purpose. *Wallgrave v. Tebbs*, 2 Kay & J. 313. But in that case the court reached the conclusion that the testator intended A. to take the entire beneficial interest, and to leave the application of the devise to his mere honor, uncontrolled by any court. That is not this case, for here Mrs. Sullivan intended to control Mrs. Davis' discretion. Let us put the hardest possible case to test the theory just stated. Let us suppose that Mrs. Sullivan had become bankrupt, instead of Mrs. Davis, and that the trustee of Mrs. Sullivan sought to recover the property from Mrs. Davis, while the latter was trying to carry out the intention of Mrs. Sullivan for the benefit of the grandchildren. Even in that case, it must still be said that Mrs. Sullivan's intention was not to rely upon Mrs. Davis' honor, but to impose on her a binding trust. If that intention failed, and if the trust did not bind the grantee, the person paying the purchase money would naturally prefer to take into her disposition the property for which she had paid, rather than to leave it altogether in the disposition of the nominal grantee. If, therefore, the trust in favor of the grandchildren was not validly declared, there was a resulting trust in favor of Mrs. Sullivan. Even if there be a possibility that Mrs. Davis so agreed to hold the property in question as to create a valid trust for the grandchildren, the result is the same. After the stipulation entered into by Mrs. Sullivan, the guardian of the children has practically withdrawn opposition to the petition of the bill. By that stipulation the grandchildren have practically ceased to be interested in the establishment of the trust. They are to have the entire beneficial interest, even if a resulting trust is declared. Therefore the court is justified, con-

sidering the stipulation and the action of the guardian *ad litem*, in granting the prayer of the petition, even if there be a possibility that the trust was validly declared. The grandchildren cannot alienate the real estate without the consent of their guardian, duly appointed, and substantial justice is done to them and to all. The prayer of the petition is granted.

*Decree for complainant, without costs.*¹

In re CONDRIN.

COLOHAN *v.* CONDRIN.

HIGH COURT OF JUSTICE, CHANCERY DIVISION, IRELAND.
1914.

[1914] 1 I. R. 89.

ADJOURNED SUMMONS.

The facts of the case were as follows:

Philip Condryn, of Castle Street, Bray, Co. Wicklow, was a builder and owner of houses at Bray. His elder brother, Daniel Condryn, who was aged 78, was a plumber, and lived with and was supported by his brother, and assisted him in his business and the management of his property. On May 27th, 1909, Philip Condryn had a deposit and current account with the Hibernian Bank, Bray. On that day he withdrew from deposit the sum of £1135 19s. 1d., and placed that sum, together with £64 0s. 11d., making in all £1200, on deposit receipt in the joint names of himself, Amelia Condryn, his wife, and Daniel Condryn, his brother. The deposit receipt was in the form usually issued by bankers.

About May 27th, 1909, Philip Condryn told his wife that he was about to withdraw the deposit receipt for £1135 19s. 1d., and to place £1200 on deposit receipt in the bank in the joint names of himself, herself, and his brother Daniel Condryn. She could not recollect further what he said on that occasion, but she distinctly understood from him that his intention in making the deposit was that she and Daniel Condryn should have the moneys so deposited in the event of anything happening to him. After this conversation on the 27th May, 1909, Philip Condryn went to the bank by himself, and brought back slips on which she and Daniel Condryn signed

¹ Compare *Kern v. Beatty*, 267 Ill. 127; *Siemon v. Schurck*, 29 N. Y. 598.

their names. She was informed that these slips were required by the bank for the signature book. Philip Condrin then took the slips away, and when going out said to her that the placing of the money on deposit receipt would be less expensive when the will would be made. He then took the slips away, and shortly afterwards came back with the deposit receipt for £1200, in the joint names of himself, herself, and Daniel Condrin. He then gave the deposit receipt to her, to put up with the other papers, such as share certificates, which she kept for him.

These facts appeared from the affidavits of the bank manager and of Amelia Condrin. It also appeared from her affidavit that Philip Condrin had given her money from time to time before and after the date of the deposit of the £1200, amounting to about £260, which he told her was for herself, and to place it on deposit receipt in her own name, which she did.

No communication was made by Philip Condrin to the bank officials, or to anyone else, as to his intention in making the deposit of £1200.

Shortly afterwards, on July 28th, 1909, Philip Condrin made his will, leaving all his leasehold property in Bray to his wife Amelia Condrin and his brother Daniel Condrin, as joint tenants for their joint lives, and to the survivor for his or her life, and directing the said property to be sold after their deaths, and the proceeds to be applied for the rebuilding and improvement of the Roman Catholic Church of Bray known as the Church of the Holy Redeemer, and leaving whatever other assets, money, shares and stocks, he should die possessed of, and his residuary estate, to his trustees and executors, on trust to pay the income thereof to his wife and brother for their joint lives and the survivor for his or her life, and after their deaths he directed the same, or whatever should represent the same, to be applied to the improvement and repairs of the Roman Catholic Church of Little Bray known as St. Peter's. He appointed Archdeacon Gorman, or whoever should be parish priest of Bray at the time of his death, and the Most Rev. William J. Walsh, or whoever should be Archbishop of Dublin at the time of his death, his executors.

Philip Condrin died on March 4th, 1913. The will was proved by the plaintiff, the Rev. R. F. Colohan, parish priest of Bray. No mention of the deposit receipt was made by

Philip Condryn to Mr. O'Meara, the solicitor who prepared his will, although the testator purported to give his solicitor a full account of his property.

The £1200 remained on deposit in the Bank at the death of Philip Condryn, and the receipt was endorsed by Amelia Condryn and Daniel Condryn; and the amount of it and interest transferred to the executor's account at the Bank, but they claimed it as their property as survivors.

This summons was accordingly taken out by the executor, the Rev. R. F. Colohan, against Amelia Condryn and Daniel Condryn as defendants, that it might be determined whether the sum of £1200 was the property of Amelia Condryn and Daniel Condryn, as survivors of Philip Condryn, or whether it formed part of the estate of Philip Condryn. The summons was served on the Attorney-General for Ireland, as representing the charities.

O'CONNOR, M. R. I have no doubt in this case. On May 27th, 1909, Philip Condryn lodged on deposit receipt in the Hibernian Bank at Bray the sum of £1200, in the names of himself, Amelia Condryn, his wife, and Daniel Condryn, his brother. That made them joint tenants at law of that sum of money. A question has been raised whether Philip Condryn by this transaction intended to confer a benefit upon Amelia Condryn and Daniel Condryn, or either of them. Outside the transaction itself there is no evidence to throw any real light upon the deposit. One circumstance relied on is the statement in Amelia Condryn's affidavit that the deceased said to her that it would save expense when he made his will, but that statement, if made, was an ambiguous expression.

Another circumstance relied on is the fact that the deceased gave other sums of money to his wife during his lifetime. That might be availed of as an argument by both sides. On the one hand, it might be urged as an indication of intention to confer a further benefit on his wife. On the other hand, it might be said that, having already provided her with money, there was no reason why he should give her more. Again, the evidence of Mr. O'Meara, the testator's solicitor, might be relied on in favour of the view that the intention of the deceased was to benefit his wife. He says that he prepared the testator's will, and asked him what property he had, and that he did not mention the deposit of the £1200, while he purported to give a full account of his property. The widow

and Daniel Condrin might rely on that as showing an intention to subtract that sum from the assets. On the other hand, it might be argued that he intended to conceal the transaction from everyone, including his own solicitor, in order to avoid, as he thought, payment of duty.

We are therefore driven to see what was the legal effect of the transaction itself, apart from all external evidence. It is well settled that if a deposit is made with a bank by a husband of his own money in the names of himself and his wife, there is a presumption that it is intended as an advancement for the wife in the event of her surviving her husband. The question is, what difference, if any, is made by the introduction of the name of a third person, a stranger, into the deposit receipt. There is no case made to deprive the wife of the presumption in her favour because a stranger is joined in the deposit receipt.

It has not been argued by Mr. Swayne that Daniel Condrin took any beneficial interest himself; he admitted that, as Daniel Condrin was to be regarded as a stranger, there must be express evidence of an intention to benefit him, and that there was none. His name must be taken to have been introduced as a trustee for the person or persons having the beneficial interest, that is to say, for the husband and wife during their joint lives, and, after the death of one, for the survivor, in the present case the wife. That is in accordance with the decision of MALINS, V.-C., in *Eykyn's Trusts*, 6 Ch. D. 115. Mr. Wilson argued that that case was not of much authority, but, as was pointed out by Mr. Swayne, it is recognized as law by the editors of *White and Tudor's Leading Cases in Equity*. The note in vol. 2 (8th ed.), p. 849, is as follows: — "A stranger on a purchase by a husband, taking jointly with the husband and wife, must hold the estate vested in him in trust for the survivor of the husband and wife: *Re Eykyn's Trusts*, 6 Ch. D. 115."

I cannot act on probabilities. The presumption of law is in favour of an advancement to the wife; that can only be got rid of by coercive evidence, not by probability. I must, therefore, hold that the fund was not part of the estate of Philip Condrin.

PHILLIPS *v.* PHILLIPS.

COURT OF CHANCERY, NEW JERSEY. 1913.

81 N. J. Eq. 459.

BACKES, V. C. The bill is filed for the purpose of establishing a resulting trust in favor of the complainant in a farm of eighty-eight acres, situate near Trenton, in the county of Mercer, the legal title of which is in the defendant.

On March 14th, 1910, the defendant entered into the following agreement with John L. Weber:

"TRENTON, N. J., Mch. 14th, 1910.

"This is to certify that I have this fourteenth day of March, 1910, sold to Jennie F. Phillips my farm in Lawrence Township, Mercer County and State of New Jersey, containing eighty-eight acres, more or less, for three thousand dollars, subject to a mortgage of one thousand dollars, and the said Jennie F. Phillips is to pay fifteen hundred dollars in cash and note at 3 months, for five hundred dollars, with the privilege of renewal with the payment of one hundred and twenty-five each time until the amount of five hundred dollars and interest on same is paid; this agreement to be in force by the payment of five dollars to bind this agreement until Mch. 16th, 1910, or until the deed is delivered to said Jennie F. Phillips, as per this agreement."

By deed dated March 16th, Weber and wife conveyed the premises to the defendant. The complainant paid the consideration price substantially in compliance with the terms of the contract. He claims that the defendant acted as his agent in effecting the purchase, and that because of this, and inasmuch as he had paid the purchase price, a trust resulted in his favor. On the other hand, the defendant's contention is that the purchase money was loaned to her by the complainant and with it she bought the farm for her own use. The testimony of the parties is in irreconcilable conflict, each firmly maintaining his and her own and denying the other's alleged status. Counsel contend that the burden of proof is upon his opponent, and because of the other's failure to sustain it, claim a favorable decree.

The burden of establishing a resulting trust is on the party asserting it. He must prove not only that the consideration

for the conveyance was paid by him or out of his funds, but also that the money was paid as the purchase price and not as a loan. When there is evidence from which it may be inferred that the money was advanced as a loan, the burden is on him to overcome this inference by clear and satisfactory proof. *Cutler v. Tuttle*, 19 N. J. Eq. (4 C. E. Gr.) 549, 560; *Perry Trusts* (6th ed.) par. 133.

The parties to this transaction are strangers in the sense in which that term is used in cases of this kind, and from the mere payment of the purchase price by the complainant, a trust would ordinarily be implied, were it not for circumstances which rebut such an implication.

A resulting trust arises by operation of law from contemporaneous circumstances which give the legal and equitable titles different directions. It must, therefore, arise at the instant the deed is taken and the legal title is vested in the grantee, and the situation of the transaction when the title passes is to be looked to, and not the situation preceding or following that time. *Krauth v. Thiele*, 45 N. J. Eq. (18 Stew.) 407.

By this, of course, is not meant to exclude an investigation of preceding and subsequent events, which may throw light upon the situation when the title passed.

For two years next preceding the purchase, the defendant occupied the land as a tenant, using it for pasture in connection with her homestead farm. More than a year before the conveyance she treated with the owner for its purchase and obtained a refusal at \$3,000. At the beginning of the year 1910 she sought an extension of her tenancy for another year, but the owner declined a renewal, and by representing that he had another likely purchaser, persuaded the defendant to buy. The defendant had made repeated visits to the owner to obtain a better figure, but he was obdurate and she closed the bargain at his price without consulting, and apparently against the protest of, the complainant. The defendant handed the contract to the complainant, and later on Weber, the owner, delivered the deed to him and he had it recorded. Both are in the complainant's possession. The defendant executed the \$500 note and renewals mentioned in the agreement, until finally the amount was paid. At the instance of the complainant, the defendant executed two mortgages on the farm; one to secure her note of \$1,100, the other to secure her bond for

\$1,750. Upon both the complainant realized. He redeemed the former and also the mortgage of \$1,000 on the property when it was conveyed.

The parties are first cousins, and until this dispute arose were on very friendly terms. The defendant was engaged in agriculture on an extensive scale on her homestead farm, and other farms adjoining, which she rented. At the complainant's solicitation she negotiated with him the possession of her homestead farm at a yearly sum of \$1,700. Thereafter, she says, upon learning that she had an option on the Weber farm, the complainant offered to provide her with the money to buy it, and after she concluded the agreement with Weber, the complainant carried out his promise of financial assistance; she aiding him in raising part of the purchase price by executing the securities already referred to. The details of transferring the title she left to the complainant, because he was her friend and she says her attorney in the matter. Her testimony upon the crux of the case is corroborated by two witnesses. Mr. Weber, after verifying the defendant's longstanding option, says that he had difficulty in getting the complainant, from whom he understood the defendant was to obtain it, to pay the purchase money, and that upon one occasion when dunning the complainant, the latter told him he had nothing to do with the property; that it was Jennie Phillips's; that he helped her with the money and he helped her buy it, and lent her the money, and that every time he asked the complainant for the money he was met with the answer that it was Miss Phillips's money, and he was merely getting it for her. To an inquiry of a Mr. Applegate, as to whether he had bought the place, the complainant replied that Jennie Phillips was the owner; that it belonged to her.

That the complainant was not altogether altruistic in advancing the money to the defendant appears from the fact that in the course of the year he would become the defendant's debtor to the sum of \$1,700 for the rental of the homestead farm.

The reason he assigned *in camera* for putting the legal title to the land in the name of the defendant, and the prelude to a diabolical plot against his wife, which has for its prototype Napoleon's outrage upon Josephine, is not calculated to inspire confidence in the complainant's testimony, nor are any of the attending circumstances which the complainant enlists

in the support of his claim of a resulting trust, out of harmony with the theory of a loan. .

That Weber demanded of him the purchase price is not in discord. Weber had been informed by the defendant that the complainant was to supply the means. This the complainant affirmed, and only after considerable effort was Weber able to obtain the money.

The absence of an understanding as to when the defendant was to repay the money is alluded to as favorable to the complainant's position, but this is dissipated by the facts that the complainant had then bound himself to the defendant to pay her \$1,700 for one year's use of the homestead farm, and that there was a tacit arrangement between them that their mutual accounts were to be adjusted from time to time, of which the complainant gives evidence when speaking of the use of his five cows by the defendant, for which he says she was to account. The complainant's insistence that he had not arranged with the defendant for the homestead farm until after he had taken possession of part of the Weber land, is challenged by his statement that he occupied the Weber farm in the month of February and long before the purchase by the defendant from Weber, and this occupancy is consonant with the defendant's version that the use of the fields on the Weber farm was given by her to the complainant in exchange for a like acreage of the homestead farm, which the defendant then had under cultivation.

In February of 1910 during the latter period of the defendant's tenancy (the property was purchased March 14th), the complainant went into and now holds possession of the tillable portion of the Weber farm; the defendant retaining the meadow-land. The complainant repaired the fences, cleaned up the hedge-row, fertilized the land, and did the usual other things of husbandry. These acts are pointed to by counsel as controlling factors in establishing the complainant's ownership, but to my mind they are not inconsistent with the claim of the defence. As already observed, the complainant, according to the defendant's story, had hired the homestead farm and was let into possession of part of the Weber farm while the defendant was still a tenant and before the agreement of purchase had been made, in lieu of equal acreage under cultivation, retained by the defendant, on the homestead farm. While the complainant denies that there had been any negotiations

for the homestead farm, his operations upon the Weber farm are explainable only upon the theory that he had at that time in some way interested himself in the larger tract of land, for it is not reasonable that he would have undertaken the tilling of part of the small farm, which was without house or buildings, unless it was in connection with a larger enterprise.

The complaint's insinuation that he wanted to buy the Weber farm to "hitch" it on the adjoining Scudder farm, is refuted by his admission on cross-examination that at that time he had no hold on the latter.

The complainant further insists that he expended \$421 in making repairs and improvements on the Weber farm, and that this evinces his ownership. It might have tended in that direction, if his story were true, but it was quite apparent at the hearing that his account making up this sum was padded. The repairs were none other than those which are customarily made by tenant-farmers.

The continued custody by the complainant of the contract of sale and the deed for the farm, in view of the financial, professional and blood relationship between the parties, raises no inference against the legal title of the defendant.

The complainant has not sustained the burden of proof. The weight of the evidence is clearly with the defence that the complainant advanced the purchase price as a loan.

The bill will be dismissed, with costs.

MCDONOUGH v. O'NIEL.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1873.

113 Mass. 92.

BILL IN EQUITY by the widow, being the administratrix with the will annexed and the sole legatee of John B. McDonough, to enforce a resulting trust.¹ . . .

GRAY, C. J. The decision of this case depends upon the application to the evidence of well settled rules of equity jurisprudence.

Where land conveyed by one person to another is paid for with the money of a third, a trust results to the latter, which is not within the statute of frauds. It is sufficient if the

¹ A part of the statement of facts is omitted.

purchase money was lent to him by the grantee, provided the loan is clearly proved. And the grantee's admissions, like other parol evidence, though not competent in direct proof of the trust, are yet admissible to show that the purchase money, by reason of such loan or otherwise, was the money of the alleged *cestui que trust*. *Kendall v. Mann*, 11 Allen, 15. *Blodgett v. Hildreth*, 103 Mass. 484. *Jackson v. Stevens*, 108 Mass. 94. In equity, a conveyance absolute on its face may be shown by parol evidence to have been intended as a mortgage only, and its effect limited accordingly. *Campbell v. Dearborn*, 109 Mass. 130. The findings of a master in matters of fact are not to be reviewed by the court, unless clearly shown to be erroneous. *Dean v. Emerson*, 102 Mass. 480. And in equity, as at law, the omission of a party to testify in control or explanation of testimony given by others in his presence is a proper subject of consideration. *Whitney v. Bayley*, 4 Allen, 173.

It appears and is not controverted that the deed was made by Godfrey to the defendant, whose wife was the testator's sister: that the purchase money was \$3000, of which the testator furnished \$300 of his own money, and \$200 borrowed by him of Mrs. McGovern, upon a note signed by himself and the defendant; the defendant furnished \$600 of his own money, and \$400 borrowed of Dolan upon the defendant's note: and for the remaining \$1500 the defendant gave his own note, secured by mortgage on the premises, to Clements, who held a previous mortgage for a like amount, and who testified that before the purchase the defendant came to see if that mortgage could lie on the property, and told him that he was going to buy the land for the testator, and was told by the mortgagee that he must give a new mortgage, as he afterwards did, in discharge of the old one. The will recites that the defendant held a deed of certain real estate in trust for the testator's benefit, and had paid certain sums of money on his account, and directs that all such sums of money, with interest, should be paid back to him, and he should then convey the property in fee to the testator's wife. The attorney who drew the will certifies that he read this part of it in the testator's presence, and before its execution, to the defendant, and asked him if it was right, and he said it was, and upon being asked what claims he had against the place, answered \$600, besides \$100 for repairs and \$44.08 for taxes, and that

he had received from the testator the whole amount with interest of the note to Dolan, except \$80, and that the testator had paid the note to Mrs. McGovern. The other material testimony may be taken as stated on the defendant's brief, namely, that the defendant repeatedly "admitted that he bought the place for John B. McDonough and that he meant to assist or help him;" that "the defendant said McDonough wanted him to buy the place for him," "that he had always wanted John to take the deed, but he had not paid up;" and "that he was ready to fix up the place when McDonough was ready to pay up." The master also reports that the defendant was present at the hearing before him, but did not offer to testify.

From this evidence the master, who heard all the witnesses, was warranted in finding as matter of fact that the money paid by the defendant for the land was lent by him to the plaintiff for the purpose, and that thus the whole purchase money was the plaintiff's money. Upon examination of the whole evidence, we see no sufficient cause for reversing the conclusion of the master, and taking the facts as found by him; the inference of law follows that there was a resulting trust in favor of the testator, and that there must be a

*Decree for the plaintiff.*¹

McGOWAN AND OTHERS *v.* McGOWAN AND WIFE.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1859.

14 Gray 119.

ACTION of contract, by the heirs of John McGowan, praying for relief in equity, to enforce a resulting trust. The plaintiff alleged that on the 15th of December 1851 John McGowan purchased certain real estate of Duncan McKendrick; that "the consideration paid was three hundred and twenty dollars, and also twenty four dollars more agreed at the time to be paid and paid by said John to McKendrick; that said John did not take the deed in his own name, but had it conveyed from said McKendrick to said John's brother, James McGowan, who took the said property in trust to hold the same to the use of said John and his heirs and assigns, though it did

¹ Scott *v.* Beach, 172 Ill. 273, *accord*.

not appear in the deed that said James took said property in trust as aforesaid, but the deed showed an absolute conveyance to said James in fee;" that on the 19th of said December said James, at John's request, made a note for \$320, secured by mortgage of the premises, to Samuel B. King of Taunton, payable in five years, with interest annually; "that at the time of the purchase of the property, and at the time of said mortgage, it was agreed and understood by James and John that said John was to proceed and erect a dwelling-house on said premises, and whatever other buildings he chose for his residence, and that said James should hold the same in trust for said John as aforesaid;" that John, within two years, proceeded to erect a dwelling-house on the premises at an expense of \$1100, and from the time of the completion of the house until his death in June 1858 occupied the premises with his family, and leased a part of the house and received the rents to his own use, and "also paid the annual interest on said mortgage to King as aforesaid, furnishing his brother James with the money for that purpose;" that on the 7th of June 1852 James conveyed most of his real estate, including this land, with notice of the trust, to his brother Patrick, who, on the next day, conveyed the same to Catharine McGowan, wife of James, with like notice; that Catharine and James, at the request of John, made a note of \$400 and interest, secured by mortgage on the premises, to Abiathar K. Williams, in payment for lumber furnished by him and used in building the dwelling-house; that John regularly paid the interest on this note during his lifetime, and that all the labor and materials for the house were furnished at John's request and charge, and paid for by him; "and the said James and Catharine and Patrick never, during the lifetime of said John, paid from their or either of their own proper funds, any part or portion of the interest on said mortgage, or of the sums expended for the labor and materials aforesaid; nor did they expend anything except moneys furnished by said John; and during the lifetime of said John, by their acts and admissions, always acknowledged that they held said premises upon the trust aforesaid, to wit, as trustee and trustees of said John McGowan; but that since the decease of said John, said Catharine claims and pretends that the whole of said property belongs to her absolutely, and that she does not hold it in trust as aforesaid; and she and her said husband threatened and have attempted to

eject the plaintiffs from said premises, and do claim to receive the rents and profits of the premises, and have received a portion of them."

The defendants demurred generally.

HOAR, J. The plaintiffs seek, by their bill, to enforce the execution of a resulting trust. The case made by the bill is undoubtedly one of considerable hardship; but we are unable, upon careful examination, to perceive that it admits of any relief from a court of equity, consistently with a due regard to the well settled principles of law. The whole consideration for the purchase of the estate was three hundred and forty four dollars, of which three hundred and twenty dollars was paid by the note of James McGowan, under whom the defendants claim, and to whom the conveyance was made; and twenty four dollars agreed to be paid in labor by John McGowan, the father of the plaintiffs, which was afterward paid by him. The subsequent transactions between the parties, and the improvements made upon the estate, being all proved by parol evidence, and proceeding from contracts not in writing, do not change their original relation to the title.

There is no doubt of the correctness of the doctrine, that where the purchase money is paid by one person, and the conveyance taken by another, there is a resulting trust created by implication of law in favor of the former. And where a part of the purchase money is paid by one, and the whole title is taken by the other, a resulting trust *pro tanto* may in like manner, under some circumstances, be created.

But in the latter case we believe it to be well settled that the part of the purchase money paid by him in whose favor the resulting trust is sought to be enforced, must be shown to have been paid for some specific part, or distinct interest in the estate; for "some aliquot part," as it is sometimes expressed; that is, for a specific share, as a tenancy in common or joint tenancy of one half, one quarter, or other particular fraction of the whole; or for a particular interest, as a life estate, or tenancy for years, or remainder, in the whole; and that a general contribution of a sum of money toward the entire purchase is not sufficient. *Crop v. Norton*, 2 Atk. 74. *Sayre v. Townsends*, 15 Wend. 647. *White v. Carpenter*, 2 Paige, 217. *Perry v. McHenry*, 13 Ill. 227. *Baker v. Vining*, 30 Maine, 121.

The case of *Jenkins v. Eldredge*, 3 Story, 181, might be con-

sidered a conflicting authority; but, beside the question how far the doctrines of that case can be reconciled with the general current of decisions in this commonwealth, the ground upon which Mr. Justice STORY proceeded with the most confidence in his elaborate judgment in that cause seems undoubtedly to have been, that the agreement of Eldredge to make and preserve as evidence a written declaration of trust, which he afterwards neglected and refused to make, would constitute a case of constructive fraud, against which equity would relieve.

In the case at bar, there is no allegation that any division of the property was contemplated by the parties; or that the work done by John McGowan in part payment for the conveyance was intended as anything but a small contribution toward the entire purchase.

*Demurrer sustained and bill dismissed.*¹

SKEHILL v. ABBOTT, ADMINISTRATOR, AND OTHERS.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1903.

184 Mass. 145.

BILL IN EQUITY, filed July 24, 1902, by the widow of Patrick Skehill, against the children of her late husband by a former marriage, to establish a resulting trust in certain real estate in Watertown.

In the Superior Court HARDY, J., found that a resulting trust had been established, and made a decree that two fifths of the property on Royal Street in Watertown standing in the name of the late Patrick Skehill should be set apart for the sole use and benefit of the plaintiff by partition, or, if partition should not be practicable, that the whole property should be sold and two fifths of the proceeds paid to the plaintiff.

The defendants appealed. The judge made a finding of facts, called memorandum for decree, and there also was a report of evidence by a commissioner appointed under Chancery Rule 35.

LORING, J. This is a bill in equity by a widow who claims an undivided two fifths interest in a parcel of land by way of a resulting trust. The title to the land was taken in the name of

¹ See *Olcott v. Bynum*, 17 Wall. (U. S.) 44; *Onasch v. Zinkel*, 213 Ill. 119.

her husband, now deceased, but she contributed \$1,000 of the \$2,500 which was paid for it. The judge who tried the case found these facts: The plaintiff was sixty years old, was not able to read or write, and was ignorant of business methods and the meaning of legal instruments. It was understood between the plaintiff and her husband that she should have the benefit of the \$1,000 contributed by her to provide for her old age, and it was at first suggested that this should be effected by the husband's taking the title and giving a mortgage to secure the payment of the \$1,000. This was abandoned on the husband's reporting that a lawyer who was consulted by him had said that there could be no mortgage between husband and wife. The plaintiff then said that she wanted her name to be in the deed, and this was agreed to by the husband. In addition to these facts found by the judge there was evidence that the plaintiff not only stipulated that her name should appear in the deed, but what she insisted on was that it should appear in the deed for her interest in the property. The judge further found that in place of keeping his agreement the husband took the whole title in his own name, and the title remained in him until he died; and that although the plaintiff did not stipulate for an undivided two fifths interest in terms, yet that was what was understood between the plaintiff and her husband, and it was on that understanding that she parted with her money. We are of opinion that this brings the case within *Hayward v. Cain*, 110 Mass. 273, and takes it out of *McGowan v. McGowan*, 14 Gray, 119, *Snow v. Paine*, 114 Mass. 520, *Bourke v. Callanan*, 160 Mass. 195, and *Dudley v. Dudley*, 176 Mass. 34. See also *Bancroft v. Curtis*, 108 Mass. 47; *McDonough v. O'Niel*, 113 Mass. 92.

The defendants contend that unless a plaintiff has stipulated for such a fraction as is contained in the whole without a remainder no resulting trust can be created, that is to say, if one person contributes \$500 where the purchase money is \$2,500, stipulating for an undivided fifth interest, a resulting trust is raised in his favor, but if he has parted with \$1,000 for the same purchase, stipulating for an undivided two fifths interest, he would not be entitled to anything by way of a resulting trust. They arrive at this extraordinary conclusion by finding first that the court in some of the cases cited above has said that it is not enough for a plaintiff to have contributed to the purchase money, but he must have stipulated for an aliquot

interest in the property; and then by finding that it is laid down in the dictionaries that the word "aliquot" means something contained in another a certain number of times without leaving a remainder.

Whatever definition may be given in the dictionaries, the word "aliquot" was used in these opinions to mean a "particular fraction of the whole," as distinguished from a general contribution to the purchase money. To that effect see *McGowan v. McGowan*, 14 Gray, 119, 121.

The other point made by the defendants is that the judge was wrong in his findings of fact. There was a direct conflict between the witnesses on the question whether the plaintiff's \$1000 was lent to the husband or was contributed for an interest in the property. The judge saw the witnesses and heard the testimony of the plaintiff. It is enough that his decision was not plainly wrong. *Dickinson v. Todd*, 172 Mass. 183, and cases cited.

*Decree affirmed.*¹

THE JACKSONVILLE NATIONAL BANK v. BEESLEY,
IMPLEADED, etc.

SUPREME COURT, ILLINOIS. 1895.

159 Ill. 120.

Mr. JUSTICE CARTER delivered the opinion of the court. The questions in this case arise on the cross-bill filed by Sarah G. Beesley in the suit for foreclosure of a mortgage, brought in the circuit court of Morgan county, September 25, 1894, by Edward P. Kirby, as administrator of the estate of Ceres C. Taylor, deceased. Kirby, as such administrator, sold certain lands described in the bill to Benjamin F. Beesley, April 20, 1889, for \$8100, and conveyed the same to Beesley by administrator's deed. Beesley paid \$2700 cash at the time of the sale, and gave two notes, each for the sum of \$2700, due in six and twelve months, respectively, with six per cent interest. Sarah G. Beesley joined in the execution of the notes, and Beesley at the same time executed the mortgage sought to be foreclosed, upon the premises, to secure their payment. A payment of \$2500 was made by Beesley to

¹ *Currence v. Ward*, 43 W. Va. 367, *accord*.

Kirby on October 28, 1890, and Mrs. Beesley alleged in her cross-bill, that in pursuance of an agreement made with Beesley prior to the purchase of the premises, she, out of her own separate property, contributed the sum of \$2500 to make this second payment for said land, and that she was a joint purchaser and joint owner with Beesley of said premises; that the deed was made to Beesley for convenience, and she insists that a resulting trust arose in her favor, and she demands that whatever decree may be entered ordering a sale of said premises to satisfy the demands of complainant Kirby, shall also declare the amount she shall be entitled to have out of the residue as part owner, and that her estate of dower and homestead be provided for in the remainder. Benjamin F. Beesley died intestate July 14, 1892, and his widow, said Sarah G. Beesley, was appointed administratrix of his estate and is still acting in that capacity.

The Jacksonville National Bank was permitted to appear in the case as a creditor of the estate of B. F. Beesley, deceased, and it filed its answer to the cross-bill of Sarah G. Beesley, denying that she paid any part of the purchase money for said lands out of her separate property, and denied that any resulting trust had arisen out of the transaction concerning the purchase of the real estate in favor of Mrs. Beesley.

Upon a hearing had before the court, the court found that the sum of \$2500 paid by B. F. Beesley was furnished by Sarah G. Beesley out of her separate funds, pursuant to an agreement made between her and her husband prior to the conveyance of the land to Beesley by Kirby, whereby it was agreed that said Sarah G. Beesley should become joint purchaser and joint owner with her husband of said real estate. The court also found that after the mortgage was satisfied Mrs. Beesley was entitled to $\frac{3}{4}$ of the property or of the proceeds of a sale, not to exceed, however, \$2500, and that she was entitled to homestead and dower in the remainder, and entered a decree in accordance with such findings.

The testimony was taken in open court, and the chancellor who rendered the decree had an opportunity to see the witnesses and hear them testify, and was thus in a position to judge of their relative fairness, candor and credibility, and from this fact a strong presumption is raised in favor of the findings of the decree, so far as they relate to questions upon which the evidence is conflicting, and we are not disposed to disturb

the finding of the chancellor that the \$2500 paid by B. F. Beesley on October 28, 1890, to Edward P. Kirby, as part of the purchase money for said real estate, was contributed by Sarah G. Beesley, from her individual funds. The question to be determined is, whether or not a resulting trust arose, by operation of law, from the whole transaction, in favor of Sarah G. Beesley, which would entitle her to a share of the real estate, or to a share of the proceeds of a sale of the same, conceding that said second payment of \$2500 was made from money furnished by her under the agreement, as alleged.

Counsel for Sarah G. Beesley, defendant in error, state in their argument that the testimony shows that the first payment was made out of money put into the fund by Beesley, and the second payment was made out of money realized from the sale of property put into the fund by Mrs. Beesley — all done pursuant to previous agreement. Counsel then contend, that while the first payment was made with money that was furnished by Beesley, yet it was made in part for himself and in part for Mrs. Beesley, just as the second payment was made out of the proceeds of sale of the property contributed by Mrs. Beesley, all pursuant to previous arrangement, and that the agreement was, in effect, that Beesley should advance or loan her part of the first payment and she should pay it back by paying his part of the second payment.

The evidence in regard to the transaction shows that Mrs. Beesley concluded to become a joint owner of the property if she could sell certain real estate which she claimed to own as her individual property, and the evidence further shows that her property was not sold until August 3, 1889, and only \$300 was then paid in cash, the balance being in notes, which were sold for \$2234 in October, 1890, — eighteen months after the sale by Kirby to her husband of the property in question. And it nowhere appears in the record that any witness testified that an arrangement was made whereby one-half, or any other portion, of the money furnished by B. F. Beesley was a loan to his wife and paid as her money. Such a trust is never raised unless the money of the *cestui que trust* was used in the purchase of the property in which the trust is claimed to exist. *Holmes v. Holmes*, 44 Ill. 168; *Towle v. Wadsworth*, 147 id. 80; *Wallace v. Carpenter*, 85 id. 590. An alleged loan of the whole or a part of the purchase money by one who purchases property and takes a deed in his own

name must be clearly and satisfactorily established, so that a resulting trust shall arise in favor of another. *VanBuskirk v. VanBuskirk*, 148 Ill. 9; *Koster v. Miller*, 149 id. 195; *Reeve v. Strawn*, 14 id. 94. The mere fact that there was an arrangement made, prior to the purchase of the property, that Mrs. Beesley was to become a joint owner of the premises in case she could dispose of her real estate, is insufficient to bring the case within the rule that to raise a resulting trust in one's favor he must furnish the consideration money, or some aliquot part thereof, as part of the original transaction, at the time the purchase was made. *Perry v. McHenry*, 13 Ill. 227. The burden of proof is upon the party seeking to establish the trust, and he must prove that the alleged *cestui que trust* paid the purchase price. *VanBuskirk v. VanBuskirk*, *supra*; 10 Am. & Eng. Ency. of Law, 29.

The testimony further shows that Mrs. Beesley was suggested by Beesley as security on the two notes given by him for the deferred payments of the purchase money, when security was asked for, and that the notes were taken away by him after being assured that his wife's name on them would be sufficient, and that he afterwards returned them signed by her. It further appears that she had filed her claim for said \$2500 against Beesley's estate, but she testifies that she was ignorant of the law, and so filed her claim under the advice of counsel then acting for her. But taking the view of the testimony most favorable to her, it appears that there was a parol agreement between Beesley and his wife, prior to the purchase of the property in question, that Mrs. Beesley should furnish the money to meet the second payment on the land, provided she could sell certain property owned separately by her, and that she should share in the profits when a sale of the property purchased from Kirby should be made. Such a transaction would not establish a resulting trust for the benefit of one making the second payment, for there is nothing in it from which the conclusion can be drawn that it was part of an arrangement whereby any portion of the first payment by Beesley was to be considered as a loan to Mrs. Beesley. The case is, in this respect, very different from *Towle v. Wadsworth*, *supra*. A resulting trust does not spring from the contract or agreement of the parties, but from their acts. It is not created by contract, but by implication of law apart from contract. *VanBuskirk v. VanBuskirk*, *supra*. Such an

agreement, followed by the payment of the money contemplated by it, might be sufficient to establish an express trust; but where the Statute of Frauds is pleaded, as in this case, such a trust cannot be established without a writing. "The funds must be advanced and invested at the time the purchase is made. A resulting trust cannot be created by funds subsequently furnished. It is not possible to raise such a trust by the subsequent application of the money of a third person in satisfaction of the unpaid purchase money." *Reed v. Reed*, 135 Ill. 482, on p. 487. "No oral agreements, and no payments before or after the title is taken, will create a resulting trust, unless the transaction is such, at the moment the title passes, that a trust results from the transaction itself." *Stephenson v. McClintock*, 141 Ill. 604, on p. 611.

It follows from what has been said, taking the facts as testified to by appellee Sarah G. Beesley and her witnesses, that no resulting trust arose in her favor. We are of the opinion that the learned chancellor of the circuit court erred in the decision of the case in that court in the respect mentioned, and the decree will accordingly in that respect be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

SECTION V.

Where a Person Acquires an Interest in Property in Regard to which, by Reason of his Fiduciary Position, he owes a Duty to Another.

Ex parte LACEY.

CHANCERY. 1802.

6 Ves. 625.

THE subject of this petition was strong charges of misconduct by assignees under a Commission of Bankruptcy executed in the country; one of whom was a banker; into whose bank the money was paid. Another of the assignees was himself the purchaser of part of the bankrupt's estate, sold under the Commission; and he also purchased from some of the creditors their dividends. The estates in question, consisting of three lots, were twice put up to sale. At the first sale the

assignee was the purchaser at 420*l.*: another person, bidding *bona fide*, having gone to 415*l.* The assignee having them again put up some time afterwards was at the subsequent sale again the purchaser at 375*l.* The Solicitor for the Commission appeared at the sale bidding for the assignee.

Mr. *Romilly*, in support of the petition.

Mr. *Richards* and Mr. *Stratford* for the assignees said, persons were misled by the rule, as laid down in *Whichcote v. Lawrence*, 3 Ves. 740, 750; not, that a trustee cannot buy from the *Cestuy que trust*; but, that he, who undertakes to act for another in any matter, shall not in the same matter act for himself; and therefore a trustee to sell shall not gain any advantage by being himself the person to buy.

LORD CHANCELLOR [ELDON]. The rule I take to be this; not, that a trustee cannot buy from his *Cestuy que trust*, but, that he shall not buy from himself. If a trustee will so deal with his *Cestuy que trust*, that the amount of the transaction shakes off the obligation, that attaches upon him as trustee, then he may buy. If that case is rightly understood, it cannot lead to much mistake. The true interpretation of what is there reported does not break in upon the Law as to trustees. The rule is this. A trustee, who is entrusted to sell and manage for others, undertakes in the same moment, in which he becomes a trustee, not to manage for the benefit and advantage of himself. It does not preclude a new contract with those, who have entrusted him. It does not preclude him from bargaining, that he will no longer act as a trustee. The *Cestuy que trust* may by a new contract dismiss him from that character; but even then that transaction, by which they dismiss him, must according to the rules of this Court be watched with infinite and the most guarded jealousy; and for this reason; that the Law supposes him to have acquired all the knowledge a trustee may acquire; which may be very useful to him; but the communication of which to the *Cestuy que trust* the Court can never be sure he has made, when entering into the new contract, by which he is discharged. I disavow that interpretation of Lord Rosslyn's doctrine, that the trustee must make advantage. I say, whether he makes advantage, or not, if the connection does not satisfactorily appear to have been dissolved, it is in the choice of the *Cestuy que trust*, whether they will take back the property, or not; if the trustee has made no advantage. It is founded

upon this; that though you may see in a particular case, that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties, in ninety-nine cases out of an hundred, whether he has made advantage, or not. Suppose, a trustee buys any estate; and by the knowledge acquired in that character discovers a valuable coal-mine under it; and locking that up in his own breast enters into a contract with the *Cestuy que trust*; if he chooses to deny it, how can the Court try that against that denial? The probability is, that a trustee, who has once conceived such a purpose, will never disclose it; and the *Cestuy que trust* will be effectually defrauded. In the case of *Fox v. Mackreth*, 2 Bro. C. C. 400; 2 Cox 320, so much referred to upon this subject, and now become a leading authority, in which I have now Lord Thurlow's own authority for saying, he went upon a clear mistake in dissolving the Injunction, it was never contended, that if Fox in a transaction clear of suspicion, but which, as I have stated, must be looked at with the most attentive jealousy, had discharged Mackreth from the office of trustee, he would not have been able to hold the purchase. Why? Because, being no longer a trustee, he was not under an obligation not to purchase. But we contended, that it was not in the power of Fox to dismiss him; that the trust was accepted under an express undertaking to the friends of Fox, that the trustee should not be dismissed without their privity; that Fox himself had too much imbecility of mind as to these transactions; and we contended, that between the dates of Mackreth's taking upon himself the character of trustee and purchasing he had acquired a knowledge of the value of the estate by sending down a surveyor at the expense of the *Cestuy que trust*; which was not communicated to the *Cestuy que trust* even at the moment of the supposed dissolution of the relation between them; and under those circumstances we contended, that Mackreth remained a trustee. This was the principle, upon which the cause was decided. Either that cause ought to have been decided in favor of Mackreth, or this Court originally and the House of Lords finally were right in refusing an issue to try, whether the estate was of the value Mackreth gave or of a greater value at that time. Upon this principle that was an immaterial fact; for, if the original transaction was right, it was of no consequence, at what price

he sold it afterwards; if the original transaction was wrong, Mackreth not having discharged himself from the character of trustee, if an advantage was gained by the most fortuitous circumstance, still it was gained for the benefit of the *Cestuy que trust*, not of the trustee.

Upon these principles it is perfectly clear, that an assignee under a Commission of Bankruptcy, a trustee to sell for the benefit of the creditors and of the bankrupt, cannot buy for his own benefit. In *Whelpdale v. Cookson*, 1 Ves. 9, I understand Lord Hardwicke did confirm the sale, in case the majority of the creditors interested should not dissent. With all humility I doubt the authority of that case; for if the trustee is a trustee for all the creditors, he is a trustee for them all in the article of selling to others; and if the jealousy of the Court arises from the difficulty of a *Cestuy que trust* duly informing himself, what is most or least for his advantage, I have considerable doubt, whether the majority in that article can bind the minority. That question does not arise upon the state of facts in this case.

As to the purchase of the debts by the assignee, as assignees cannot buy the estate of the bankrupt, so also they cannot for their own benefit buy an interest in the bankrupt's estate; because they are trustees for the creditors. In that respect there is no difference between assignees and executors; who cannot for their own benefit buy the debts of the creditors. I do not say, there may not be cases of that kind, in which in a moral view the transaction between the executor and the creditor may not be blamable: but the Court must act upon general principles. Consider the prodigious power of assignees, connected with Solicitors under the Commission, and bankers, receiving the money, over the creditors and the bankrupt. Unless the policy of the Law makes it impossible for them to do any thing for their own benefit, it is impossible to see, in what cases the transaction is morally right. But it is enough to say, the assignee was a trustee for the benefit of those entitled to the interest in the residue. He must buy for them, and not for himself. Therefore as to the debts bought this assignee must be a trustee either for the creditors or for the bankrupt; for which upon the circumstances is doubtful yet.

If persons, who are trustees to sell an estate, are there professedly as bidders to buy, that is a discouragement to others to bid. The persons present seeing the seller there to bid for

the estate to or above its value do not like to enter into that competition. It is the duty of the solicitor to the Commission in point of law to insist, that the assignee should make the utmost value. In this case the Solicitor had two interests, drawing him different ways. Lord Kenyon in *Twining v. Morrice*, 2 Bro. C. C. 326, thought the sale might be prejudiced by the mere circumstance, that the agent for the vendor appeared as a bidder. That is going a great way: but it shows, that the Court is in the habit at least of strictly regarding such a circumstance. It may be a material prejudice, even if he says, he bought it in. For instance in *Kirton's* case lately 23,000*l.* was *bona fide* bid; and the estate was bought in by the agent for the vendor. Afterwards there was another sale in the Master's office; and the consequence of that circumstance, deterring others from bidding, was, that the estate finally sold for 7000*l.*, a depreciation contrary to all experience. So this very estate, sold before to his assignee for 420*l.*, at that sale produced a real bidder at 415*l.*; but being bought in was afterwards sold again to the same assignee for 375*l.* He cannot hold that purchase: but I am called upon to charge him with the sum of 420*l.* Upon that I have great hesitation as to what I ought to do; not being sure, what will be the effect of the precedent. Suppose, instead of this small difference, it had been the case of an estate with a coal mine, as it was in *Kirton's* case, and the unauthorised biddings of the assignees had occasioned such a loss as there was in that instance, I ought to consider long, whether that loss should fall upon the creditors. I wish to consider farther upon the part of the case; as though the value is small in this instance, it is of great importance as a precedent. I wish assignees to understand from this, that they are not to buy in without the privity of the creditors at least; admitting, that this assignee in buying acted honestly, meaning to act for the benefit of the creditors and fairly. As to the particular desire of the bankrupt, I admit, they are to have considerable regard to the desire of the bankrupt: but that is not to be carried too far; and this distinction must be attended to; whether it is for his own benefit, or honestly intended for the benefit of his creditors; in which latter case it may have considerable weight.

With respect to the purchase of these three lots I shall hold him to the purchase as against himself, but not in his favor. I shall therefore make the same order, that I made in another

bankruptcy (*Ex parte Hughes*, 6 Ves. 617. See *Lister v. Lister*, 6 Ves. 631), that an account shall be taken of the rents and profits from the time of the purchase; that these lots shall be sold again; being put up at the sum of 375*l.*, if any one bids more, the assignee shall not have them; and if not, he shall take them; reserving my opinion upon the question, how he is to be charged as to the difference in the amount of the two sales; and declaring him a trustee as to the dividends purchased; being clearly of opinion, that an assignee cannot under any circumstances buy a debt for his own benefit.¹ . . .

BAUGH'S EXECUTOR *v.* WALKER.

SUPREME COURT OF APPEALS, VIRGINIA. 1883.

77 Va. 99.

LACY, J.² . . . In this case the trustee paid \$900.87 to lift a lien from the trust estate, but he paid it at a time when Confederate money was the sole currency of the country, and if it did effect the raising of a gold debt of that amount from the trust estate, which is admitted, such an advantage cannot enure to him personally, but must be credited to the trust estate with which he was dealing; but he is entitled to receive back, upon the rule of compensation, the value of what he paid. It is not perfectly clear when he paid it, as to the precise time; the deed for his benefit was written and dated November 5, 1862. Delivered by intendment of law on the 22d of August, 1863, it might be contended that he did not pay this money until this deed was delivered, but the court below has fixed the date of its payment at the date of the deed, and it cannot be presumed to have been paid before that time. But there is one circumstance in this record which fixes beyond all question the fact that it was paid in Confederate money. It was paid to take in John Baugh's note to Wilson, but was not paid

¹ As to the purchase of trust property by the trustee from himself or his co-trustee, see *Fox v. Mackreth*, 2 Bro. C. C. 400, 2 Cox 320; *Whichcote v. Lawrence*, 3 Ves. 740; *Campbell v. Walker*, 5 Ves. 678; *Delves v. Gray*, [1902] 2 Ch. 606; *Broder v. Conklin*, 121 Cal. 282; *Hayes v. Hall*, 188 Mass. 510; *Clark v. Delano*, 205 Mass. 224; *Corbin v. Baker*, 167 N. Y. 128.

As to the purchase of trust property by the trustee from the *cestui que trust*, see *Coles v. Trecothick*, 9 Ves. 234; *Mills v. Mills*, 63 Fed. 511; *Cole v. Stokes*, 113 N. C. 270.

² Only part of the opinion of the court is here given.

to Wilson. Wilson had sold the note, and the trustee bought from the assignee of Wilson, and the evidence in the cause shows what this assignee paid Wilson, the principal of the note being about \$800. Wilson received \$200 in money, and a horse which he allowed \$600 for. It is very improbable that this transaction was on a gold basis, and this was antecedent to the purchase by the trustee, and it would be most inequitable to allow this trustee, by the payment of so small a value, to raise so large a claim against his *cestui que trust*. The court scaled this debt at three for one, and under the circumstances of this case, that action ought not to be disturbed.¹ . . .

MAGRUDER v. DRURY AND MADDOX, TRUSTEES.

SUPREME COURT OF THE UNITED STATES. 1914.

235 U. S. 106.

MR. JUSTICE DAY delivered the opinion of the court.² . . .

The next exception involves the allowance of commissions on the notes purchased from Mr. Drury's firm. The contention before the auditor was that one trustee had received compensation in connection with the handling of these investments, and that that should be taken into account. As to this exception, the auditor finds that "the fact clearly appears from the testimony that Arms & Drury as real estate brokers, made loans on trust notes, upon which loans they were paid by the borrowers a commission ranging from one to two per cent., according to the circumstances of the case, many being building loans; that subsequently as notes of the trust estate were paid off Mr. Drury would reinvest the monies of the estate in trust notes held by Arms & Drury, paying the face value and accrued interest on the notes so purchased." As a matter of law, the auditor concluded: "No profit was made by the firm of Arms & Drury on the sales of the notes to the trustees. . . . The transactions of Arms & Drury with the

¹ See *M'Clanahan's Heirs v. Henderson's Heirs*, 2 A. K. Marsh. (Ky.) 388; *Baker v. Springfield, etc., Ry. Co.*, 86 Mo. 75. Compare *Fulton v. Whitney*, 66 N. Y. 548; *Kimball v. Ranney*, 122 Mich. 160; *Haight v. Pearson*, 11 Utah 51. As to the purchase of an outstanding title or incumbrance by one joint owner, see 6 Gray, *Cases on Property*, 2d. ed., pp. 510-533.

² A part of the opinion is omitted.

trustees were in the regular course of their business, in which they had their own monies invested. They cost the estate not a penny more than if the transactions had been with some other firm or individual. If the firm of Arms & Drury, out of their own monies, made loans on promissory notes, upon which loans were paid by the borrower the customary brokerages, those were profits on their own funds, in which this estate could have no interest, and in which it could acquire no interest by reason of the subsequent purchase of those notes by the trustees for their real value, any more than could any of the purchasers of such notes from Arms & Drury claim such an interest. No charge of malfeasance or misfeasance is made against the trustees or that by reason of these transactions the trustees benefited in any manner out of the money of this estate. On the contrary, the relation of the firm of Arms & Drury to Drury and Maddox, trustees, benefited the estate, by enabling the trustees at all times to make immediate re-investment of its funds, without loss of income, and by enabling the trustees to at all times readily procure re-investments without payment of brokerage, a brokerage not uncommonly charged the lender for placing his money, as well as the borrower for procuring his loan in times of stringency. The application of the well known rule in equity should rather, therefore, be in favor of the trustees than against them with respect to these transactions. The objection narrows itself to a claim that Drury by reason of his position as trustee, should in addition to the benefit of his valuable services, commercial knowledge, and business acumen, make the estate a gift of profits on his individual monies, to which the estate is in no wise entitled, and to which it could not make a semblance of reasonable claim, had the trustees been other than Drury or the agents of the estate been other than Arms and Drury." This view seems to have met with the approval of the Supreme Court, and a like view was taken by the Court of Appeals of the District of Columbia, 37 D. C. App. 519, *supra*.

It is a well settled rule that a trustee can make no profit out of his trust. The rule in such cases springs from his duty to protect the interests of the estate, and not to permit his personal interest to in any wise conflict with his duty in that respect. The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary

capacity. "It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells." *Michoud v. Girod*, 4 How. 503, 555.

It makes no difference that the estate was not a loser in the transaction or that the commission was no more than the services were reasonably worth. It is the relation of the trustee to the estate which prevents his dealing in such way as to make a personal profit for himself. The findings show that the firm of which Mr. Drury was a member, in making the loans evidenced by these notes, was allowed a commission of one to two per cent. This profit was in fact realized when the notes were turned over to the estate at face value and accrued interest. The value of the notes when they were turned over depended on the responsibility and security back of them. When the notes were sold to the estate it took the risk of payment without loss. While no wrong was intended, and none was in fact done to the estate, we think nevertheless that upon the principles governing the duty of a trustee, the contention that this profit could not be taken by Mr. Drury owing to his relation to the estate, should have been sustained.

We find no other error in the proceedings of the Court of Appeals, but for the reason last stated, its decision must be reversed, and the cause remanded to that court with directions to remand the cause to the Supreme Court of the District of Columbia for further proceedings in accordance with this opinion.

*Reversed.*¹

KEECH v. SANDFORD.

CHANCERY. 1726.

Sel. Cas. Ch. 61.

A PERSON being possessed of a lease of the profits of a market devised his estate to a trustee in trust for the infant.

¹ See *St. Paul Trust Co. v. Strong*, 85 Minn. 1. Compare *In re Sykes*, [1909] 2 Ch. 241.

Before the expiration of the term the trustee applied to the lessor for a renewal, for the benefit of the infant, which he refused, in regard that, it being only of the profits of a market, there could be no distress, and must rest singly in covenant, which the infant could not enter into.

There was clear proof of the refusal to renew for the benefit of the infant, on which the trustee gets a lease made to himself.

Bill is now brought [by the infant] to have the lease assigned to him, and for an account of the profits, on this principle, that wherever a lease is renewed by a trustee or executor, it shall be for the benefit of *cestui que use*, which principle was agreed on the other side, though endeavoured to be differenced on account of the express proof of refusal to renew to the infant.

LORD CHANCELLOR KING. I must consider this as a trust for the infant, for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*. Though I do not say there is a fraud in this case, yet he [the trustee] should rather have let it run out than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequences of letting trustees have the lease on refusal to renew to *cestui que use*.

So decreed, that the lease should be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.¹

LURIE v. PINANSKI.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1913.

215 Mass. 229.

MORTON, J. This is a bill in equity for an accounting in respect of a partnership, consisting of the plaintiff, the defendant and one Silverman, in relation to certain leasehold interests. The case was sent to a master who made a report in favor of the plaintiff. A decree was entered confirming

¹ See *In re Biss* [1903] 2 Ch. 40; *Smyth v. Byrne*, [1914] 1 I. R. 53.

the report and ordering the defendant to pay to the plaintiff the sum of \$1,041.60, with costs of suit. The defendant appealed.

The principal contention of the defendant is that the plaintiff is not entitled to relief because he himself at one time, according to the findings of the master, "asked the lessor," "without the knowledge or consent of the defendant or Silverman," "for a new lease of the Brooks' estate in his own name at an increased rent." In other words, the defendant contends that the plaintiff does not come into court with clean hands. But, to quote from *Dering v. Winchelsea*, 1 Cox, 318, 319, though a man must come into equity with clean hands; "when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for." In the present case, there was no such immediate and necessary relation between what the plaintiff did or attempted to do and what the defendant did as to render the principle applicable. If the plaintiff and the defendant had confederated together to have the defendant obtain a renewal of the lease in his own name without the knowledge of and to the exclusion of Silverman, with the agreement that any profits resulting therefrom should be divided between the plaintiff and the defendant, and the defendant for some reason had concluded to pay Silverman what would have been his share of the profits and had refused to pay the plaintiff and the plaintiff had brought a bill for an accounting, a case would have been presented for the application of the principle. But the present is not such a case. What the plaintiff did was to attempt without success to get a lease for himself without the knowledge of his copartners. And though his conduct shows a readiness on his part to circumvent his copartners if he could, that does not bring the case within the principle referred to. See *Lawton v. Estes*, 167 Mass. 181; *Snow v. Blount*, 182 Mass. 489.

Amongst other things on which the defendant relies is the statute of frauds. It is manifest that that has nothing to do with the case. Besides, it is not pleaded. The master having found that the plaintiff and defendant were partners, the defendant stood in a fiduciary relation to the plaintiff and could not clandestinely take (as the master has in effect found that he did take) a renewal of the lease for his own benefit. *Leach v. Leach*, 18 Pick, 68, 76. The option was clearly

impressed with a trust in favor of the plaintiff. In addition to the trust arising out of the fiduciary relation created by the partnership, a part of the consideration for the option was furnished by the plaintiff under and pursuant to an understanding between the lessor and lessees, as the master has found that the lessees should have an extension of the lease. Under such circumstances, for the defendant to take the option in his own name and attempt to appropriate the profits thereof to his own use constituted not only a breach of trust but a fraud upon his copartners.

*Decree affirmed with costs.*¹

ANDERSON *v.* LEMON.

COURT OF APPEALS, NEW YORK. 1853.

4 Seld. 236.

THIS was an appeal from the decision of the superior court of the city of New York, dismissing the bill filed by the appellant, Anderson against Lemon, his former partner, praying for a partition, or a sale and division of the proceeds of certain real estate occupied by the parties as copartners under a lease, the fee of which had been purchased by the defendant in his own name, during the existence of the copartnership; and that the defendant account for the subsequent use of the property. The facts sufficiently appear in the report of the decision in the court below, 4 Sandf. S. C. Rep. 552, and in the opinion of this court.

GARDINER, J., delivered the opinion of the court. In a note to *Moody v. Matthews*, 7 Ves. 185, Sumner's Ed., it is said, as a deduction from adjudged cases, that "with a possible exception in favor of a *bona fide* purchaser, it seems to be an universal rule that no one who is in possession of a lease, or a particular interest in a lease, which lease is affected with any sort of equity in behalf of third persons, can renew the same for his own use only; but such renewal must be construed as a graft upon the old stock." In *Featherstonhaugh v. Fenwick*, 17 Ves. 298, it was held that a renewal obtained one month before the expiration of the lease by two of three part-

¹ See *Acker v. McGaw*, 106 Md. 536; *Pikes Peak Co. v. Pfuntner*, 158 Mich. 412; *Knapp v. Reed*, 88 Neb. 754; *Mitchell v. Reed*, 61 N. Y. 123, 84 N. Y. 556.

ners for their own benefit, enured to the partnership and must be accounted for as partnership property. But it has been held in several cases, that during the continuance of the lease, any one, even a trustee of the leasehold interest, may purchase the reversion in fee on his sole account. For, although the *cestui que trust* will be deprived of all claim of renewal, yet it has been thought impossible to consider the purchase of the inheritance as a graft upon leasehold, or life interests. 7 Ves. 186, note, Sumner's Ed.; 3 Meriv. 197, 352; 3 Atk. 38. The learned judge who delivered the opinion of the superior court was therefore correct in saying that a copartner was at liberty to make the purchase stated in this case, under circumstances free from deception and fraud, and consequently to retain it.

These parties were copartners. They had an established place of business, which had been improved with their joint funds. It is obvious that when the negotiations for the purchase of the lot in question were first discussed, each of them supposed the copartnership would continue on some terms, although those terms were to be the subject of future adjustment. Under these circumstances the complainant proposed to purchase the premises. The object of that purchase, or one of the objects, as is conceded, was to preserve for the copartnership jointly, their place of business, with all its advantages of location and established reputation. In the negotiations which ensued, the parties consulted with each other and acted together. The complainant was the agent by whom the propositions previously canvassed and agreed upon were communicated to the agent of the owners of the fee. The results of these interviews between Anderson and West were communicated from time to time to the defendant, who assented to what was proposed, and continued to advise with the complainant in relation to the joint purchase, down to the 26th of August. Upon that day, as the defendant alleges in his answer, the treaty as to the continuance of the copartnership ended in a definite proposition upon the part of the complainant, which the defendant in one part of his answer states that he rejected, and in another that the complainant requested an answer to his proposal, and that he in reply observed that he could say nothing further as to the copartnership until he received a letter from his brother in Troy.

Now from the early part of the previous May, the defendant had been negotiating secretly with West, the agent of the owners, for the purchase of this property for his own benefit; and while advising with his partner as to a joint purchase, was covertly bidding against him, with a request that his name might be concealed. His excuse for conduct which an honorable man could hardly justify, is, that he had learned for the first time, in August, that the complainant intended to purchase in his own, and not in the partnership name. This excuse cannot be true if West is to be believed, for he swears that the first overtures to him on the part of Lemon were in May, and that the biddings continued down to the month of August, during which time the property had been advanced from \$14,000 to \$17,000 by successive bids, and was finally taken by the defendant at \$18,000.

Again, he does not pretend that the complainant intimated that the title which he was to take in his own name was not for the partnership account; or that he (the defendant) objected to the proposed mode of securing the property. The difference between the parties was as to the terms of the subsequent partnership, not as to the mode in which the title was to be obtained. The copartnership had not then terminated, and its continuance was in the contemplation of both parties: the purchase was, ostensibly to be made for the benefit of the firm: the complainant upon the facts proved and admitted would have been the agent of both parties in effecting the bargain; and I see no reason why the defendant as the copartner and confidential adviser of the complainant did not incur the same obligation. If he designed to act independently of the complainant, he should have declared his intention, when the parties would have stood upon a footing of equality. As it was, he availed himself of the influence arising from the relation existing between him and the complainant as copartner, and as his confidential adviser, in a treaty for the purchase of real estate, begun and continued for months for their joint benefit, to induce such action upon the part of the firm, as should ultimately throw the property and the good will of the establishment into his own hands. This was not merely an offence against goods morals; it was a legal fraud, against which the complainant is entitled to relief. The defendant took a fraudulent advantage of his situation, and must be held a trustee of the property thus acquired for the benefit of the

copartnership. 1 Paige, 158; and cases there cited: 17 Vesey, 311. In the last case it was held, that a partner could not treat privately behind the back of his copartner for a renewal of a lease of the property where the business of the firm was carried on; if he did so he should be held a trustee for the firm. In that case the copartner obtaining the renewal was merely silent as to his intentions. Here the defendant counseled with, and by his conduct and declarations intentionally induced the plaintiff to believe, that he was acting for the benefit of the firm, when his object was to secure the purchase for himself. There is nothing in the nature of the property acquired, that can shield the defendant from the consequences of such a fraud.

The judgment should be reversed and the defendant declared a trustee, etc.

*Ordered accordingly.*¹

FISCHLI v. DUMARESLY.

COURT OF APPEALS, KENTUCKY. 1820.

3 A. K. Marsh. 23.

THE CHIEF JUSTICE delivered the opinion of the court.

This was a bill filed by Dumaresly against Fischli, to obtain a conveyance of a moiety of four lots in the town of Louisville. He alleges that he and Fischli agreed to jointly purchase the lots, and that Fischli was to advance the whole of the purchase money, and to receive from him interest for his half thereof, until it was repaid. That Fischli accordingly made the purchase of the lots; but instead of taking the conveyance to them jointly, took it to himself, only, and refuses to convey to Dumaresly a moiety of the lots, notwithstanding he has offered to repay one half of the purchase money, with interest. He, therefore, prays that Fischli may be decreed to convey, etc.

Fischli, in his answer, denies that he made the purchase for the joint benefit of Dumaresly and himself. He admits that, at the inception of the negotiation, he conceived the idea of

¹ See *Bevan v. Webb*, [1905] 1 Ch. 620; *Griffith v. Owen*, [1907] 1 Ch. 195. Compare *Hopper v. Hopper*, 79 Md. 400; *Turner v. Fryberger*, 94 Minn. 433.

making such a purchase, but alleges that for reasons, which he states in his answer, and to which Dumaresly assented, he declined making a joint purchase, and contracted in his own name, and for his own benefit; and he pleads and relies upon the statute against frauds and perjuries.

The court below decreed Fischli to convey a moiety of the lots, and Dumaresly to repay to Fischli one half of the purchase money, with interest; and to that decree, Fischli prosecutes this writ of error.

It is evident that the decree cannot be sustained. The parol testimony in the cause strongly conduces, indeed, to prove the agreement alleged in the bill; but that agreement was never reduced to writing; and a mere verbal or unwritten contract for lands is remediless, according to the express provisions of the statute against frauds and perjuries.

There may, no doubt, be an equity resulting from facts, or the relation of the parties, which, notwithstanding the statute, may be enforced: for it is only to express contracts that the provisions of the statute apply. As, for example, where the conveyance of land is taken in the name of one, and the purchase money appears to have been paid by another, there will a trust result, by implication, to the latter, which is not within the influence of the statute. But in this case, there is no fact from which a trust can result to Dumaresly. The whole purchase money is admitted to have been paid by Fischli; and if Dumaresly has any equity, it must arise exclusively from the express contract of the parties, which not being in writing, cannot be enforced, according to the provisions of the statute.

The idea suggested in the argument, that Fischli acted as the agent of Dumaresly in making the purchase to the extent of a moiety of the lots, and that the statute does not require the authority of an agent to be in writing, cannot take the case out of the influence of the statute. The sufficiency of the authority of Fischli to have made a joint purchase in Dumaresly's name and his own, is not called in question. He has not done so, but has made the purchase in his own name; and whether he had an authority to make a purchase for the joint benefit of both, or not, is immaterial, if the agreement that he would do so cannot be enforced, because it was not reduced to writing.

The decree must be reversed, with costs, the cause remanded, that the bill may be dismissed, with costs.¹

WAKEMAN, APPELLANT, *v.* DODD, RESPONDENT.

COURT OF ERRORS AND APPEALS, NEW JERSEY. 1876.

12 C. E. Green 564.

APPEAL from a decree of the Court of Chancery, made in accordance with the opinion of the Vice-Chancellor, reported in 11 C. E. Green, 485.

DODD, J. At a foreclosure sale on the 23d of October, 1868, certain mortgaged premises belonging to the complainant, Laura S. Dodd, were purchased by the defendant, John P. Wakeman, for the sum of \$3750. In the following March, Wakeman sold the premises for \$6500. In July, 1873, the complainant brought suit to recover from Wakeman the difference between his disbursements and receipts, alleging in her bill a parol contract, by which he agreed to purchase at the sheriff's sale, hold the premises in trust until they could be resold, and pay her whatever should be realized above his expenses.

The cause having been heard by the Vice-Chancellor, a decree was made in accordance with the prayer of the bill. Upon the argument of the appeal in this court, exception was taken to the ruling expressed in the advisory opinion, that a parol contract to purchase land at a sheriff's sale for the benefit of the defendant in execution will be enforced in equity even if free from fraud, unless the statute is properly invoked by the pleading to nullify the contract. The exception taken to this ruling is correct. Where the case is free from fraud, and the wrong on the part of the defendant consists solely in refusing to do what he agreed, an answer denying the agree-

¹ Emerson *v.* Galloupe, 158 Mass. 146, *accord*.

For cases where the defendant agreed to take the conveyance in the name of the plaintiff, see Chastain *v.* Smith, 30 Ga. 96; Burden *v.* Sheridan, 36 Iowa 125; Rose *v.* Hayden, 35 Kans. 106; Collins *v.* Sullivan, 135 Mass. 461; Johnson *v.* Hayward, 74 Neb. 157, 5 L. R. A. (N. S.) 112.

For cases where the defendant agreed to take the conveyance in his own name and to hold for or reconvey to the plaintiff, see Butts *v.* Cooper, 152 Ala. 375; Lancaster Trust Co. *v.* Long, 220 Pa. 499. But see Chattock *v.* Muller, 8 Ch. D. 177. Compare Whiting *v.* Dyer, 21 R. I. 278 (holding that the agreement was unenforceable for want of consideration).

ment is a good answer to the bill. The bar to the complainant's suit is then complete, because no proof of the parol agreement can then be admitted, such proof being illegal by the statute. But where the answer admits an agreement, though only a parol one, the defendant must plead the statute in order to obtain its protection. In this respect, there is a wide difference between the statute of frauds and the statute of limitations, which it seems must in all cases be pleaded. Fry on Spec. Perf., secs. 332, 336, 337; Browne on the Statute of Frauds, sec. 511, and the cases cited in note 3.

This rule of pleading was not drawn in question in the New Jersey cases referred to in the opinion below, viz., *Combs v. Little*, 3 Green's Ch. 310; *Marlatt v. Warwick and Smith*, 3 C. E. Green 109, and 4 C. E. Green 441; *Merritt v. Brown*, 6 C. E. Green 404. In *Walker v. Hill's Executors*, decided in this court, 7 C. E. Green 519, the correct rule of pleading, as above given, is distinctly declared. In all these cases the jurisdiction of equity to enforce the parol contracts was placed upon the ground that there were facts, aside from the contract, evincive of fraud on the part of the purchaser. When the parol contract is made use of as the means of misleading the complainant and deceiving him out of his property, relief is afforded in equity because of the fraud, and not by virtue of the contract. So far, therefore, as the evidence in this case goes merely to the proof of the agreement set out in the bill, it is illegal and cannot support the decree.

It was further contended for the appellant that the decree could not be supported for fraud because the facts evincive of it were neither properly averred in the bill nor established by the proofs. The bill avers in substance and effect that the defendant is the brother-in-law of the complainant; that he took much interest in her affairs prior to the sale by the sheriff, acting as her adviser in regard to it and offering to purchase in her interest; that relying on his promise to do so she refrained from attending the sale and from procuring any one else to attend for her, and from taking any steps to raise the money to stop it; that the defendant attended and bought in the premises, and refused to execute the trust she had thus been induced to repose in him. These statements of the bill are sufficient allegations that the complainant was misled and deceived, and, if proved, would justify a decree founded upon intentional fraud. But the evidence in respect to these points

is conflicting and inconclusive, and does not, in my judgment, establish such fraud. The complainant, at that time, had separated from her husband whose habits were bad, and was living with the defendant, where she lived prior to and at the time of her marriage, and was expecting to obtain a divorce, and to avail herself in the future of the defendant's aid and protection. After the sheriff's sale she changed her purposes and plans, and upon the death of her husband in 1872, asserted her present claim. It is unnecessary to review the circumstances leading to and following the purchase and sale by the defendant, as disclosed in the testimony of the parties themselves and the other witnesses in the cause. From the evidence as a whole, it is fairly to be inferred that neither of the parties regarded the transaction at the time it occurred, as they came to regard it after the four or five subsequent years, during which their mutual relations had changed. That the defendant did not consider his purchase, when made or at any time afterwards, as the result of or in pursuance of a contract with the defendant, and that his purpose in making the purchase was quite the opposite of one to deceive and defraud, is clearly deducible, I think, from the proofs, and is, indeed, more consistent with the conduct and declarations of the parties themselves, than is the contrary belief. But while this is so, and while the imputation of intentional fraud may in this view be avoided, it is manifest from the evidence that the defendant was, at the time of the purchase, the complainant's confidential adviser. Standing in this fiduciary relation, the beneficial results of the purchase must be hers instead of his. The correctness of the decree upon this ground was so apparent at the close of the argument on behalf of the appellant, that further hearing was dispensed with.

The elementary principle of equity, by which a trustee is disabled to purchase for his own benefit the property of his *cestui que trust*, is too plainly applicable to the facts of this case to leave room for controversy or doubt. Without reference to fraudulent intent, and irrespective of the parol contract alleged in the bill, the facts, as they are pleaded and proved, conclusively evince that as to the property in question the defendant was the complainant's adviser, and, consequently, trustee. As such, he must be held to account. For cases illustrative of this equitable doctrine, reference need only be

made to Fox *v.* Mackreth, with the accompanying notes in Lead. Cas. in Eq., vol. I., 92, 209.

The decree should be affirmed, with costs.

*Decree unanimously affirmed.*¹

JUDD *v.* MOSELY.

SUPREME COURT, IOWA. 1871.

30 Iowa 423.

THE plaintiff, in his original and amended petition, avers that, on the 29th of September, 1860, one John F. Beatty purchased by contract, not in writing, of one Erastus Douglass, certain real estate, describing it, and then paid the consideration in full, and thereby became the owner thereof; that Douglass then agreed to convey said land by deed to said Beatty, but neglected to do so until about the 16th day of September, 1861, at which time a deed was executed and delivered; that about the 1st day of October, 1860, one Frederick Mosely purchased the same land for taxes, at a tax sale then held by the treasurer of Poweshiek county; that in 1860, and after said tax sale, and after Beatty had become the owner of the land by purchase from Douglass, and while Beatty had the right to and could have redeemed the land from such tax sale, said Beatty offered to so redeem from Mosely, or to purchase of him the tax certificate; that Mosely assured Beatty that it would be all right; that he (Mosely) would procure and obtain a tax title to the land, and convey the same to Beatty; that, with full knowledge of Beatty's ownership of the land, Mosely agreed to pay all subsequent taxes and procure a tax deed and convey to Beatty, and thereby strengthen his title to the land; and Beatty, on his part, agreed not to redeem from the tax sale; and when Mosely should obtain a tax deed and convey by quitclaim to Beatty, he agreed to pay to said Mosely the sum of money which should be due and necessary, under the laws of Iowa, to redeem the land from the tax sale and subsequent taxes paid by Mosely; that, in pursuance of such promises and agreements by said Mosely, Beatty was induced to not redeem the land from the tax sale, and permitted Mosely to pay all subse-

¹ See Allen *v.* Jackson, 122 Ill. 567; Rolikatis *v.* Lovett, 213 Mass. 545 (attorney); Rogers *v.* Genung, 76 N. J. Eq. 306 (broker).

quent taxes accruing on the land, and to perfect his tax title thereto; that, on the 3d day of November, 1865, Mosely died; that the defendants, as the minor heirs of Mosely, on the 30th day of September, 1868, obtained a tax deed upon said tax sale; that the plaintiff, for a valuable consideration, and with reference to the contract and agreements between Beatty and Mosely, purchased of Beatty all his right, title and interest in the land referred to, and received a quitclaim deed from Beatty therefor; that the defendant, Francis E. Mosely, is the guardian of the minor heirs in the State of Illinois; that they have no guardian in this State; that on the 17th day of April, 1869, the plaintiff tendered to said guardian for the use of the minor heirs, the sum of \$205, and demanded a quitclaim deed to the land in controversy, which tender was not accepted and the deed refused, and he refused to do any thing to carry out the agreements aforesaid of said Mosely, deceased. The plaintiff brings his action against the heirs of Frederick Mosely for specific performance, alleges full compliance, on the part of Beatty, with the agreement, and brings the money into court.

We have stated the substance only, of the plaintiff's cause of action, but sufficient for a proper understanding of the questions involved.

The defendants appeared and demurred to the petition; the demurrer was sustained, and plaintiff standing on the ruling on the demurrer, judgment was rendered against him for costs, from which he appeals.

MILLER, J.¹ . . . The only remaining ground of the demurrer argued and relied on is, that the contract pleaded by the plaintiff comes within the statute of frauds. In the case of *Bryant v. Hendricks*, 5 Iowa, 256, it was held that "a verbal agreement between two or more persons having claims on the public lands, that one shall enter the tract on which the claims are located, and the other should pay his proportion toward the entry of the land, was not within the statute of frauds." It was so held, on the ground that the agreement created an implied trust and that the facts which create the trust may always be proved by parol. In that case the agreement was that one of the claimants proposed to furnish his share of the money in advance to enter the land; that the defendant said he should enter the land by means of land

¹ A part of the opinion is omitted.

warrants, but that when he had done so, and the quantity and description of plaintiff's part was ascertained, he would convey the same to plaintiff. The petition further stated that it was agreed that the parties should attend at some convenient time and survey the land; that defendant, though requested, refused to attend; that plaintiff caused a survey to be made; that he tendered the money for his portion of the entry to defendant, and demanded a conveyance, which was refused. The statute of frauds was pleaded in that case, but it was held that a trust lay at the base of the contract; that it was not a contract to sell an interest in lands. So, in the case before us, the contract set up in the petition is in no sense a contract for the sale of an interest in lands. Before the tax purchase had ripened into a title the plaintiff's grantor offered to redeem from the purchaser, or to purchase the tax certificate, but he said "No, I will pay all subsequent taxes, and when my purchase ripens into a title, and I receive the treasurer's deed, then I will convey the land to you by quitclaim, you paying such sum of money as you would be then required to pay under the law to redeem the land." To this Beatty agreed. The transaction created an implied trust that will be enforced in a court of equity, the plaintiff having tendered the proper sum of money, demanded a deed, and the defendants having refused.

The demurrer should have been overruled.

The appellant presents in his argument a question upon the ruling of the court in excluding certain depositions. Whether there was error or not in this ruling we are unable to determine, inasmuch as the depositions are not in the record, nor any thing else, to show whether the ruling was correct or otherwise.

*Reversed.*¹

ESSEX TRUST CO. *v.* ENWRIGHT AND ANOTHER.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1913.

214 Mass. 507.

BILL IN EQUITY, filed in the Superior Court on November 3, 1911, by the trustee under a mortgage made to secure the

¹ *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196; *Ryan v. Dox*, 34 N. Y. 307, *accord.* *Walter v. Klock*, 55 Ill. 362; *Barnet v. Dougherty*, 32 Pa. 371, *contra.*

bonds of the Lynn Publishing Company, a corporation, against Frederick W. Enwright and the Lynn Publishing Company, to enjoin the defendant Enwright, as lessee under a lease from the International Trust Company, from evicting the plaintiff or the Lynn Publishing Company from certain premises on Willow Street in Lynn, where a newspaper called the Lynn Evening News was published by the plaintiff as trustee, and to have the defendant Enwright declared a constructive trustee holding such lease for the benefit of his former employer, the Lynn Publishing Company, and of the plaintiff as mortgagee in possession, and also to have the defendant ordered to assign such lease to the plaintiff.

The defendant Enwright in his answer asked that the bill might be dismissed, and also filed a motion to dismiss. Certain holders of the bonds secured by the mortgage made to the plaintiff as trustee filed a motion to be allowed to prosecute the suit in the name of the plaintiff, as trustee, for the benefit of themselves and other bondholders.

The case was heard by JENNEY, J. He denied the motion to dismiss, and allowed the motion of the bondholders to be permitted to prosecute the suit. On the facts found by him he made an order that the bill should be dismissed with costs, and reported the case for determination by this court as described in the opinion. If the order of the judge was correct, the bill was to be dismissed with costs; otherwise, such decree was to be entered as should be ordered by this court.

LORING, J. The question on which the decision in this case depends is this: In case a reporter on a newspaper in the course or by reason of his employment learns that the premises on which the business of publishing the paper is conducted are of peculiar value to his employer or one carrying on his business, has he the right without his employer's knowledge to take a lease of the premises and hold them as his own to the injury of his employer's property?

The case comes before us on a report without the evidence. The statement in the report of the facts of the case is in one or more material points somewhat meagre.

The material facts stated in the report were in substance as follows: The defendant Enwright, hereinafter called the defendant, was a reporter on a daily newspaper published in Lynn, which was mortgaged to the plaintiff trust company to secure an issue of bonds, the amount of which is not stated.

The business of making up and printing the newspaper was carried on in two stories and in the basement of a building in Lynn, of which two stories and basement the Lynn Publishing Company (the mortgagor) was a tenant at will. The printing press of the Publishing Company was "situated in the basement upon a foundation of concrete, embedded in the earth underneath the building, and could not be removed from said basement and set up in some other place in less than two weeks' time, and at a very considerable expense. While the press was being taken down and being set up in another place the paper could not be published unless it made arrangements for its printing from some other press, and it appeared in evidence that no press was in Lynn that could be used for that purpose in connection with the electrotyping plant of the company except after expensive alterations in the electrotyping plant." "Outside of its machinery, type, fixtures, and furniture, it depended for the value of its property on the good will of the business, and upon the ability to get out its paper daily."

On July 1, 1911, the Publishing Company defaulted on the mortgage interest. By the terms of the mortgage the mortgage trustee could not take possession until ninety days after the default. On Tuesday, October 3, 1911, the plaintiff trust company took possession and proceeded to take the necessary steps to foreclose its mortgage by a sale in accordance with its terms. The trust company continued the publication of the paper.

The defendant had been employed as a reporter by the mortgagor for a period not stated. He did not devote his whole time to the business and was paid "at the rate of five to seven dollars a week for such services as he rendered in gathering and reporting news." When the plaintiff trust company took possession on October 3, 1911, it continued to employ the defendant as a reporter. "About" that time the defendant applied to one Porter for a lease of the premises in which the business of publishing was conducted by his employer. Porter told him that he was the lessor of the second story only, and that the International Trust Company was the lessor of the first floor and the basement. Porter refused to give the defendant a lease of the second story, the premises owned by him. Thereupon, on October 4, 1911, the defendant applied to the agent of the trust company for a lease of the first floor and

basement, telling the agent "that he represented parties who were going to take over the paper." "A few days later" a written lease from October 2 (October 1 being a Sunday) was delivered to the defendant for a term not stated, and on October 31 the defendant gave the plaintiff notice to quit on the following Friday, which was November 3.

The findings already stated establish the peculiar value which these premises had to the defendant's employer or to any one carrying on the employer's business of publishing this newspaper. And it is evident from the facts found by the judge who heard the case in the Superior Court that the defendant realized that. It is found that "during the summer after the interest had been defaulted, the defendant went to various bondholders and endeavored to buy their bonds," and that "he offered them fifty cents upon the dollar therefor," and that "after obtaining the lease he went to various bondholders and offered them twenty-five cents on the dollar" for the same bonds. It further is found that "he stated to various persons that the person who had secured the lease would be the winner in the long run, and asked some of these persons if they were going to the funeral, meaning the funeral of the paper published by the publishing company."

It is not found directly as a fact, but it is the fair inference to be drawn from the facts found, that the defendant learned in the course or by reason of his employment of the peculiar value which these premises had for his employer. It was found directly (in effect) that knowledge of the fact that his employer was in arrears in the payment of rent came to the defendant by reason of his employment. That fact, however, is a fact of secondary importance.

The doctrine invoked by the plaintiff in this suit had its origin in two decisions by Lord Eldon. In *Yovatt v. Winyard*, 1 Jac. & W. 394, the defendant (formerly employed as a clerk by the plaintiff, who was a veterinary surgeon) was enjoined from using medicines compounded from the plaintiff's recipes which he (the defendant) had surreptitiously copied while in the plaintiff's employ. In *Abernethy v. Hutchinson*, 3 L. J. (O. S.) c. 209, the publication in the *Lancet* of lectures on surgery delivered by the plaintiff at St. Bartholomew's Hospital, which the defendants had obtained from the students attending the lectures, was enjoined. The ground on which Lord ELDON went in this case was subsequently stated by

more rent a year. It appeared in evidence that Hamlin had built up a good will in connection with his theatre by ten years' occupancy. Davis was directed to hold the lease which he had secured as trustee for Hamlin.

The defendant has argued that he was not within this rule because the duty of securing a lease was not entrusted by his employer to him. The same contention was the main argument put forward in *Davis v. Hamlin*, and was true of the clerk in *Gower v. Andrew*. The complaint against the defendant is that he has made use of information which has come to him in his employment to the detriment of his employer. In our opinion that is enough to entitle the employer to equitable relief.

We find nothing in the cases cited by the defendant which calls for notice. There is one case not cited by the defendant which requires a word of explanation. We refer to *Clark v. Delano*, 205 Mass. 224. The facts found by the master in that case were as follows: The plaintiff had employed the defendant as one of several brokers to secure a loan of the money necessary to prevent the foreclosure of a mortgage on his (the plaintiff's) land. The defendant was employed before the end of May. A foreclosure sale of the land was advertised for June 26. On June 18 the defendant learned from some one other than the plaintiff of the impending foreclosure sale. On June 18 or 19 he reported to the plaintiff that he had not been able to secure the loan. The plaintiff asked him to continue his efforts, to which the defendant made no answer, but the master found that the plaintiff was justified in believing that he intended to continue them. The plaintiff did not intend the foreclosure sale, relying on a statement by the mortgagee that he supposed that no one would attend and that he, the mortgagee, would have to bid the property in, "in his own interest and that of the plaintiff." The defendant bought the property for himself at the foreclosure sale, having conceived the idea of doing so the day before the sale. It was held that he had a right to do so. Of this case it is to be remarked in the first place that the defendant (the broker) did not forestall his employer by buying behind his back, but bought at a foreclosure sale in no way brought about by him, at which he had to compete with the plaintiff (his former employer) on equal terms. And what is of more importance, the land had no peculiar value to the employer, as the premises

in question in the case at bar have to this plaintiff, and as the buildings in question in *Gower v. Andrew* and *Davis v. Hamlin* had to the plaintiffs in those cases. For these two reasons the defendant in *Clark v. Delano* was not taking advantage of information obtained in the course of his employment as to the peculiar value of the property to his employer by securing it for himself behind his employer's back, to his (the employer's) detriment.

The bill, which was originally filed by the trustee named in the mortgage, is now being prosecuted, by leave of court, in its name by the bondholders who bought in the property at the foreclosure sale. The foreclosure sale was had after the hearing in the Superior Court, but before the case was reported to this court. The defendant originally objected to this, but the objection has not been argued on the brief or at the bar, and we treat it as waived.

The plaintiff is entitled to a decree directing the defendant to assign to the plaintiff the lease obtained by him on being paid the amount of the rent, if any, paid by him under it, and to its costs. See *American Circular Loom Co. v. Wilson*, 198 Mass. 182, 206. But the plaintiff is under no obligation to the defendant as to the rent due from the Lynn Publishing Company (the mortgagor) to the International Trust Company and paid by the defendant to it.

A decree for the plaintiff on these terms must be settled in the Superior Court.

So ordered.

SECTION VI.

*Where Property is Acquired by One Person by the Wrongful Use of
the Property of Another.*

SHALER AND OTHERS, APPELLANTS, v. TROWBRIDGE
AND OTHERS, RESPONDENTS.

COURT OF ERRORS AND APPEALS, NEW JERSEY. 1877.

28 N. J. Eq. 595.

THIS cause was argued at May Term, 1876, before Hon. Amzi Dodd, a special master, to whom it had been referred by the chancellor. The facts sufficiently appear in his opinion, and in that delivered on the appeal.

VAN SYCKEL, J.¹ In January, 1865, Joseph A. Trowbridge, Brainard Shaler, John Kiersted and Wynkoop Kiersted entered into partnership in the leather business, which was terminated by the death of Trowbridge, December 14, 1869. During its continuance, Trowbridge had charge of the books and finances. The contested question on this appeal is, whether certain real estate and certain policies of life insurance, to which Mary E. Trowbridge held the legal title at her husband's death, should be decreed to be in equity the property of the firm? The evidence shows that Trowbridge alone drew the firm checks, and exclusively managed its money affairs, and that the yearly balance-sheets, made up and presented by him to the firm, were false and fraudulent. Checks of the firm to the amount of \$103,155.97 were drawn by him to his own individual use, and paid at the bank, none of which were either included in his yearly balance-sheets, or charged to him on the books of the firm. At the same time the amount drawn by him during the existence of the partnership, and actually charged to his accounts, exceeded what he would have been entitled to, by the articles of copartnership, by more than \$15,000; so that, upon an adjustment of the partnership concerns, he will be indebted to the firm in more than \$118,000.

Out of the moneys drawn upon the uncharged checks, or by the checks themselves in some instances, Trowbridge paid for the real estate and the policies of insurance now in controversy. The policies were issued, in the first place, in favor of Trowbridge himself, and the half-yearly premiums paid by the uncharged checks of the firm to the insurance company's agent. In April, 1868, they were changed, by Trowbridge's request, so as to be payable to his wife, who, after her husband's death, received the several amounts due upon the policies from the insurance companies. Upon this statement of facts, which the case satisfactorily establishes, shall the real estate, and the proceeds of the policies, be declared to be held in trust by the wife as the property of the firm?

This is not a case of resulting trust, where the trust results, or is implied, from the contracts and relations of the parties. It arises, *ex maleficio*, out of the active fraud and dishonest conduct of the partner Trowbridge, and may be termed a constructive trust, which equity will fasten upon the conscience of the offending party, and convert him into a trustee of the legal

¹ The opinion of the special master is omitted.

title, and order him to hold and execute it in such manner as to protect the rights of the defrauded party, and promote the interest and safety of society. It differs from other trusts in that it is not within the intention or contemplation of the parties at the time the contract is made upon which it is construed by the court, but it is thrust upon a party contrary to his intention and against his will. 1 Perry on Trusts, sec. 166.

If a person, occupying a fiduciary capacity, purchases property with fiduciary funds in his hands, and takes the title in his own name, he will, by construction, be charged as a trustee for the person entitled to the beneficial interest in the fund with which such purchase was made. This rule applies to a partner who fraudulently purchases for himself with the partnership funds, and it extends to personal as well as real estate; in every case the equitable ownership rests in the person from whom the consideration moves. *Johnson v. Dougherty*, 3 C. E. Gr. 406; *Cutler v. Tuttle*, 4 C. E. Gr. 558; *Dyer v. Dyer*, 1 Lead. Cas. in Eq. 203; 1 Perry on Trusts, secs. 127-130.

In *Taylor v. Plumer*, 3 M. & S. 575, Lord Ellenborough said that if A is trusted by B with money to purchase a horse for him, and he purchases a carriage with that money, B is entitled to the carriage. That it made no difference, in reason or in law, into what other form, different from the original, the change may have been made, for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right ceases only when the means of ascertainment fail. This is declared to be the settled rule, in Story's Eq. Juris., secs. 1258, 1259.

So completely are the two things identified, even at law, where the conversion can be clearly traced, that in equity a distinction can never be drawn, between the money misappropriated and the results of its investment, in favor of the fraud-doer.

Nor does it make any difference that the investment turns out to be a profitable one, for, whatever the profit may be, it must belong to the *cestui que trust*. It is a constructive fraud upon the latter to use his property unlawfully and to retain the profit of the misapplication, it being a fundamental principle in regard to a trustee that he shall derive no gain

to himself from the employment of the trust fund. 2 Story's Eq. Juris., sec. 1261; McKnight's Ex'rs v. Walsh, 9 C. E. Gr. 509.

Much more does public policy require that one who has corruptly thrust himself into the position of a trustee, shall not profit by his fraud. The fact that this property has been passed into the hands of the wife does not prevent the application of these equitable principles. She received it as a gift from her husband, without paying any consideration whatever for it. Where once a fraud has been committed, not only is the person who committed the fraud precluded from deriving any benefit from it, but every innocent person is so, likewise, unless he has, in good faith, acquired a subsequent interest for value; for a third person, by seeking to derive any benefit under such a transaction, or to retain any benefit resulting therefrom, becomes *particeps criminis*, however innocent of the fraud in the beginning. 1 Perry on Trusts, sec. 172, and cases cited.

It is urged that a life policy should be exempt from the equitable rule which applies to other transactions, because it differs in its character from ordinary investments, and is a beneficent provision for the family, which should be favored.

Public policy clearly forbids the adoption of this suggestion; it would invite the commission of the wrong by assuring the wrong-doer that there is one mode in which he could surely profit by his turpitude, in securing a provision for his family. The policy is the thing which the partnership money purchased, and it stands in the place of what was corruptly abstracted. Whether the policy would be productive, when terminated by death, of more or less than the premiums paid upon it, would depend upon the length of the life insured. The fact that it has a contingent value does not distinguish it, in principle, from an investment in the purchase of stock, or of an annuity, and can give no support to the claim of the widow, that nothing should be exacted from her beyond the amount of premiums paid upon it out of the firm funds. If this suit had been prosecuted in the life-time of the husband, and the policy had been disposed of to the company for its surrender value, it would hardly have been insisted that he could claim, in a court of conscience, a right to any excess of the proceeds after refunding to his firm the amount of the premiums. All the premiums were paid with the partnership

funds — nothing was paid by the wife. The transfer to her, therefore, cannot change the equities, nor divest the trust.

The inflexible rule, in equity, will be equally violated, whether she takes the value of the policies in excess of the premiums paid, or the appreciation in the real estate.

Trowbridge contributed nothing, in money or otherwise, to the purchase or support of the policies. The entire sum derived from them is the product of the partnership money. He did no act upon which he could have based the slightest claim in equity to be benefited by the transaction. It would be idle to denounce his turpitude, and, at the same time, to reward it by allowing him to transmit its fruits to his family. His wife can derive, through so corrupt a source, no equitable rights to these policies; neither public policy, nor the intrinsic justice of the case, would be promoted by permitting her to do so.

In my opinion, the decree below should be affirmed, and the case remitted, that it may be proceeded in accordingly.

*Decree unanimously affirmed.*¹

CAMPBELL v. DRAKE *et al.*

SURPEME COURT, NORTH CAROLINA. 1844.

4 Ired. Eq. 94.

CAUSE removed from the Court of Equity of Wake County, at the Fall Term, 1845.

The bill states that the plaintiff kept a retail shop in Raleigh, and that a lad, by the name of John Farrow, was his shop-keeper for several years; and that, while in his employment, Farrow abstracted, to a considerable amount, money and goods belonging to the plaintiff, and that with the money of the plaintiff, taken without his knowledge or consent, Farrow purchased a tract of land at the price of \$500. The bill states a great number of facts, tending to shew that Farrow paid for the land with the effects of the plaintiff, which he dishonestly converted to that purpose. Farrow afterwards died under age, and the land descended to his brothers and

¹ *Lehman v. Gunn*, 124 Ala. 213; *Holmes v. Gilman*, 138 N. Y. 369, *accord*.

The Statute of Frauds does not bar the claim of the *cestui que trust* to land acquired by the misuse of trust funds. *Lane v. Dighton*, 1 Amb. 409, overruling earlier cases which reached the opposite result.

sisters; and the plaintiff, having discovered his losses of money and merchandize, and that Farrow had purchased the land as aforesaid, filed this bill against his heirs, and therein insists, that he has a right to consider the purchase as made, and the land held, for the use of the plaintiff, and that Farrow should be declared a trustee for him.

The bill was answered, so as to put in issue the various charges of dishonesty by Farrow, and the fact that the land was paid for with money purloined from the plaintiff: and much evidence was read to those points.

RUFFIN, C. J. The Court, though naturally inclined to every presumption in favor of innocence, and especially of a young person who seems to have been so well thought of while he lived, is satisfied from the proofs, that the plaintiff was much plundered by this youth; and we have no doubt, that every cent of the money with which he paid for the land, he had pilfered from his employer. Nevertheless, we believe the bill cannot be sustained. The object of it is to have the land itself, claiming it as if it had been purchased for the plaintiff by an agent expressly constituted; and it seems to us, thus stated, to be a bill of the first impression. We will not say, if the plaintiff had obtained judgment against the administrator for the money as a debt, that he might not come here to have the land declared liable, as a security, for the money laid out for it.¹ But that is not the object of this suit. It is to get the land, which the plaintiff claims as his; and, upon the same principle, would claim it, if it were worth twenty times his money, which was laid out for it. Now, we know not any precedent of such a bill. It is not at all like the cases of dealings with trust funds by trustees, executors, guardians, factors, and the like; in which the owner of the fund may elect to take either the money or that in which it was invested. For, in all those cases, the legal title, if we may use the expression, of the fund, is in the party thus misapplying it. He has been entrusted with the whole possession of it,

¹ In *Edwards v. Culberson*, 111 N. C. 342, it was held that where land is bought with money obtained by fraud, the defrauded person has an equitable lien on the land to secure the amount of which he has been defrauded. The same result was reached in the following cases, in which there was likewise no fiduciary relationship: *Humphreys v. Butler*, 51 Ark. 351; *Harrison v. Tierney*, 254 Ill. 271; *National Mahaiwe Bank v. Barry*, 125 Mass. 20. See also the numerous cases where, as in *Brennan v. Tillinghast*, 201 Fed. 609, 615, a bank obtains deposits by fraudulently concealing its insolvent condition.

and that for the purpose of laying it out for the benefit of the equitable owner; and therefore all the benefit and profit the trustee ought, in the nature of his office, and from his relation to the *cestui que trust*, to account for to that person. But the case of a servant or a shop-keeper is very different. He is not charged with the duty of investing his employer's stock, but merely to buy and sell at the counter. The possession of the goods or money is not in him, but in his master; so entirely so, that he may be convicted of stealing them, in which both a *cepit* and *asportavit* are constituents. This person was in truth guilty of a felony in possessing himself of the plaintiff's effects, for the purpose of laying them out for his own lucre; and that fully rebuts the idea of converting him into a trustee. If that could be done, there would be, at once, an end to punishing thefts by shop men. If, indeed, the plaintiff could actually trace the identical money taken from him, into the hands of a person who got it without paying value, no doubt he could recover it; for his title was not destroyed by the theft. But we do not see how a felon is to be turned into a trustee of property, merely by showing that he bought it with stolen money. If it were so, there would have been many a bill of the kind. But we believe, there never was one before; and therefore, we cannot entertain this. But we think the facts so clearly established, and the demands of justice so strong on the defendants to surrender the land to the plaintiff, or to return him the money that was laid out in it, that we dismiss the bill without costs.

*Decree accordingly.*¹

NEWTON, RESPONDENT, v. PORTER *et al.*, APPELLANTS.

COURT OF APPEALS, NEW YORK. 1877.

69 N. Y. 133.

ANDREWS, J.² This is an equitable action brought to establish the right of the plaintiff to certain securities, the proceeds of stolen bonds, and to compel the defendants to account therefor.

In March, 1869, the plaintiff was the owner of \$13,000 of government bonds, and of a railroad bond for \$1,000, nego-

¹ Hart v. Dogge, 27 Neb. 256, *accord*.

² A part of the opinion is omitted.

tiable by delivery, which, on the 12th of March, 1869, were stolen from her, and soon afterwards \$11,500 of the bonds were sold by the thief and his confederates, and the proceeds divided between them. William Warner loaned a part of his share in separate loans and took the promissory notes of the borrower therefor. George Warner invested \$2,000 of his share in the purchase of a bond and mortgage, which was assigned to his wife Cordelia without consideration.

In January, 1870, William Warner, George Warner, Cornelia Warner and one Lusk were arrested upon the charge of stealing the bonds, or as accessories to the larceny, and were severally indicted in the county of Cortland. The Warners employed the defendants, who are attorneys, to defend them in the criminal proceedings, and in any civil suits which might be instituted against them in respect to the bonds, and to secure them for their services and expenses, and for any liabilities they might incur in their behalf, William Warner transferred to the defendants Miner and Warren promissory notes taken on loans made by him out of the proceeds of the stolen bonds, amounting to \$2,250 or thereabouts, and Cordelia Warner, for the same purpose, assigned to the defendant Porter the bond and mortgage above mentioned.

The learned judge at Special Term found that the defendants had notice at the time they received the transfer of the securities, that they were the avails and proceeds of the stolen bonds, and directed judgment against them for the value of the securities, it appearing on the trial that they had collected or disposed of them and received the proceeds.

The doctrine upon which the judgment in this case proceeded, viz.: that the owner of negotiable securities stolen and afterwards sold by the thief may pursue the proceeds of the sale in the hands of the felonious taker or his assignee with notice, through whatever changes the proceeds may have gone, so long as the proceeds or the substitute therefor can be distinguished and identified, and have the proceeds or the property in which they were invested subjected, by the aid of a court of equity, to a lien and trust in his favor for the purposes of recompense and restitution, is founded upon the plainest principles of justice and morality, and is consistent with the rule in analogous cases acted upon in courts of law and equity. It is a general principle of the law of personal property that the title of the owner cannot be divested with-

out his consent. The purchaser from a thief, however honest and *bona fide* the purchase may have been, cannot hold the stolen chattel against the true proprietor, but the latter may follow and reclaim it wherever or in whosoever hands it may be found. The right of pursuit and reclamation only ceases when its identity is lost and further pursuit is hopeless; but the law still protects the interest of the true owner by giving him an action as for the conversion of the chattel against any one who has interfered with his dominion over it, although such interference may have been innocent in intention and under a claim of right, and in reliance upon the title of the felonious taker. The extent to which the common law goes to protect the title of the true owner has a striking illustration in those cases in which it is held that where a willful trespasser converts a chattel into a different species, as for example, timber into shingles, wood into coal, or corn into whiskey, the product in its improved and changed condition belongs to the owner of the original material. *Silbury v. McCoon*, 3 N. Y., 380, and cases cited. The rule that a thief cannot convey a good title to stolen property has an exception in case of money or negotiable securities transferable by delivery, which have been put into circulation and have come to the hands of *bona fide* holders. The right of the owner to pursue and reclaim the money and securities there ends, and the holder is protected in his title. The plaintiff was in this position. The bonds, with the exception stated, had, as the evidence tends to show, been sold to *bona fide* purchasers, and she was precluded from following and reclaiming them.

The right of the plaintiff in equity to have the notes and mortgage while they remained in the possession of the felons or of their assignees with notice, subjected to a lien and trust in her favor, and to compel their transfer to her as the equitable owner, does not, we think, admit of serious doubt. The plaintiff, by the sale of the bonds to *bona fide* purchasers, lost her title to the securities. She could not further follow them. She could maintain an action as for a conversion of the property against the felons. But this remedy in this case would be fruitless, as they are wholly insolvent. Unless she can elect to regard the securities in which the bonds were invested as a substitute, *pro tanto*, for the bonds, she has no effectual remedy. The thieves certainly have no claim to the securities in which the proceeds of the bonds were invested

as against the plaintiff. They, without her consent, have disposed of her property, and put it beyond her reach. If the avails remained in their hands, in money, the direct proceeds of the sale, can it be doubted that she could reach it? It is not necessary to decide that, in the case supposed, she would have the legal title to the money, but if that question was involved in the case I should have great hesitation in denying the proposition. That she could assert an equitable claim to the money, I have no doubt. And this equitable right to follow the proceeds would continue and attach to any securities or property in which the proceeds were invested, so long as they could be traced and identified, and the rights of *bona fide* purchasers had not intervened.

In *Taylor v. Plumer*, 3 M. & Sel., 562, an agent, intrusted with a draft for money to buy exchequer bills for his principal, received the money and misapplied it by purchasing American stocks and bullion, intending to abscond and go to America, and absconded, but was arrested before he quitted England, and surrendered the securities and bullion to his principal, who sold them and received the proceeds. It was held that the principal was entitled to withhold the proceeds from the assignee in bankruptcy of the agent, who became bankrupt on the day he received and misapplied the money. Lord ELLENBOROUGH, in pronouncing the opinion in that case, said: "It makes no difference, in reason or law, into what other form different from the original the change may have been made, whether it be into that of promissory notes for the security of money produced on the sale of the goods of the principal as in *Scott v. Surman*, Willes, 400, or into other merchandise, as in *Whitecomb v. Jacob*, Salk., 160, for the product or substitute for the original thing, still follows the nature of the thing itself so long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fails."

If, in the case now under consideration, the plaintiff had entrusted the Warners with the possession of the bonds, and they had sold them in violation of their duty, for the purpose of embezzling the proceeds, and invested them in the notes and mortgage in question, the plaintiff could, within the authority of *Taylor v. Plumer*, have claimed them while in their hands, or in the hands of their assignees with notice, and would be adjudged to have the legal title.

In courts of equity the doctrine is well settled and is uniformly applied that when a person, standing in a fiduciary relation, misapplies or converts a trust fund into another species of property, the beneficiary will be entitled to the property thus acquired. The jurisdiction exercised for the protection of a party defrauded by the misappropriation of property, in violation of a duty, owing by the party making the misappropriation, is exceedingly broad and comprehensive. The doctrine is illustrated and applied most frequently in cases of trusts, where trust moneys have been, by the fraud or violation of duty of the trustee, diverted from the purposes of the trust and converted into other property. In such case a court of equity will follow the trust fund into the property into which it has been converted, and appropriate it for the indemnity of the beneficiary. It is immaterial in what way the change has been made, whether money has been laid out in land, or land has been turned into money, or how the legal title to the converted property may be placed. Equity only stops the pursuit when the means of ascertainment fails, or the rights of *bona fide* purchasers for value, without notice of the trust, have intervened. The relief will be moulded and adapted to the circumstances of the case, so as to protect the interests and rights of the true owner. *Lane v. Dighton*, Ambler, 409; *Mansell v. Mansell*, 2 P. Wms. 679; *Lech v. Lench*, 10 Ves., 511; *Lewis v. Madocks*, 17 Ves., 56; *Perry on Trusts*, sec. 829; *Story's Eq.*, sec. 1258.

It is insisted by the counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property and the wrong-doer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by felony has been converted into other property. There is, it is said, in such cases, no trust relation between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. It would seem to be an anomaly in the law, if the owner who has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it had been converted, than one who, by an abuse of trust, has been injured by the wrongful act of a trustee to

whom the possession of trust property has been confided. The law in such a case will raise a trust *in invitum* out of the transaction, for the very purpose of subjecting the substituted property to the purposes of indemnity and recompense. "One of the most common cases," remarks Judge Story, "in which a court of equity acts upon the ground of implied trusts *in invitum*, is when a party receives money which he cannot conscientiously withhold from another party." Sto. Eq. Juris., sec. 1255. And he states it to be a general principle that "whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or the *cestui que trust*." Sec. 1258. See also, Hill on Trustees, p. 222.

We are of opinion that the absence of the conventional relation of trustee and *cestui que trust* between the plaintiff and the Warners, is no obstacle to giving the plaintiff the benefit of the notes and mortgage, or the proceeds in part of the stolen bonds. See *Bank of America v. Pollock*, 4 Ed. Ch., 215.

It is, however, strenuously insisted that the defendants had no notice when they received the securities that they were the avails or proceeds of the bonds. That if they had notice they would stand in the position of their assignors, and that the property in their hands would be affected by the same equities as if no transfer had been made, is not denied. *Murray v. Ballou*, 1 J. Ch., 566; Hill on Trustees, 259. The learned judge, at Special Term, found, as has been stated, that the defendants had notice of the larceny of the bonds, and the use made of the money arising from their sale, at the time they received the notes and mortgage. The duty of this court, upon the question of notice, is limited to the examination of the case, with a view of ascertaining whether there was evidence to support the finding of fact. If such evidence exists, the finding of the trial judge is conclusive.

We have examined, with much care, the voluminous record before us, and are of opinion that the finding is sustained by the evidence. The testimony was conflicting. The circumstances under which the defendants took the transfer of the securities were certainly unusual, and the facts then known by the defendants were calculated to create a strong pre-

sumption that the notes and mortgage came from investments of the stolen property. It was for the trial court to weigh the testimony, and, in the light of all the facts developed on the trial, to determine the question of notice. It would be a useless labor to collate the testimony on this subject, and we content ourselves with stating our conclusion, that the finding was warranted by the evidence. . . .

The judgment should be affirmed.

All concur.

*Judgment affirmed.*¹

DIXON v. CALDWELL.

SUPREME COURT, OHIO. 1864.

15 Oh. St. 412.

ERROR to the district court of Ross county.

The defendant in error, Caldwell, was the owner of a military bounty land warrant, No. 31,694, for 160 acres, issued to him by the government of the United States, under the act of congress of February 11, 1847; and, shortly after he received the same, it was fraudulently obtained from him, and replaced by a spurious or forged warrant, which, for a long time, he supposed genuine.

Without the knowledge or consent of Caldwell, the genuine warrant was sold and assigned to George Dixon, Jr., the plaintiff in error, by some person representing Caldwell, and who forged his name thereto.

Dixon, being ignorant of the fraudulent manner in which the warrant had been obtained, and alike ignorant of the forged assignment thereof, on the seventh day of February, 1849, purchased the warrant, and paid therefor one hundred and thirty dollars, believing the assignment to be the genuine assignment of Caldwell, and that, by his purchase, he was acquiring full and complete title to the warrant.

Having thus in good faith acquired, as he supposed, the warrant, Dixon, without any notice of the fraudulent manner in which it had been obtained, or of the forgery, located the same upon the land described in the petition, and obtained a patent therefor before the commencement of the original suit.

Upon this state of fact Caldwell sought to charge Dixon,

¹ Pioneer Mining Co. v. Tyberg, 215 Fed. 501; O'Neill v. O'Neill, 227 Pa. 334, *accord*.

as his trustee, for the land so located; and, in his petition, prayed for a conveyance of the portion of the lands remaining unsold; for an account of the proceeds of the part which had been sold, and for a judgment against Dixon for the amount found, with interest; also for an account of the rents and profits.

In the court of common pleas Dixon was adjudged to be a trustee of the plaintiff for the lands; and the relief prayed for was granted.

This judgment was, on error, affirmed by the district court, and to reverse this judgment of affirmance is the object of the present petition in error.

WHITE, J. The distinction between legal and equitable rights exists in the subjects to which they relate, and is not affected by the form or mode of procedure that may be prescribed for their enforcement. The code abolished the distinction between actions at law and suits in equity, and substituted in their place one form of action; yet, the rights and liabilities of parties, legal and equitable, as distinguished from the mode of procedure, remain the same since, as before, the adoption of the code. Dixon, the defendant below, is the legal owner of the land in controversy, as patentee. This is conceded by Caldwell, the plaintiff below, but, he claims to be the equitable owner, and that Dixon is his trustee, and, as such, in equity, bound to account for the proceeds of the portion of the land sold, and surrender the remainder.

There is no pretense of an express trust; nor is it claimed that the defendant acquired the property in fraud or by other unfair means. The property, therefore, having been fairly acquired, before a constructive trust can be raised in equity, and fastened upon the defendant, so as to convert him into a trustee for the plaintiff, the circumstances of the transaction must appear to be such, that it would be violating some principle of equity, to allow the defendant to retain the legal title to the land for his own benefit.

The controversy here is not solely in regard to the land warrant. The legal title to that was clearly vested in the plaintiff, and for its conversion he has a plain legal remedy against the defendant for its value; and, before it was lost in entering the land, for its recovery in specie.

The question is, whether, in the light of equity, the measure of legal relief is to be regarded as inadequate; and the de-

fendant required, by a court of equity, to surrender the land to which he acquired the legal title in good faith, and, as he supposed, for his own benefit, by the combined use of the warrant and his own means, industry and enterprise.

The defendant claims to be a *bona fide* purchaser of the land in controversy for value, without notice of the plaintiff's rights; and relies for his defense upon the rules of equity for the protection of such purchasers.

The land warrant in question was assignable in law, was in the possession and apparent ownership of the vendor, and the assignment was regular in form. The defect in the vendor's title was not apparent, and there was no reasonable ground for suspicion that the assignment had been forged. The defendant purchased and paid full value for the warrant, and is not chargeable with a want of reasonable diligence in so doing. Having no reason to suspect the existence of the plaintiff's title to the warrant, he was, in equity and good conscience, chargeable with no duty toward him in relation to its future use. If he withheld it from entry he would have been liable to return it to the plaintiff, or pay him its value. The good faith of his purchase would have been no answer to the plaintiff's legal demand. After the location of the warrant, the holder of the legal title thereof acquired an equity in the land upon which the location was made; and before the defendant clothed himself with the legal title, and while the equities were open between the parties, Caldwell's equity, being older in time, would have been better in right. But Dixon, unaffected with fraud or notice, and upon a valuable consideration paid, having obtained the legal title to the land in controversy, brings himself within the protection awarded in equity to the holder of the legal estate.

A court of equity, says Sugden in his Treatise on Vendors, vol. 3, side p. 417, acts upon the conscience, and as it is impossible to attach any demand upon the conscience of a man who has purchased for a valuable consideration, *bona fide*, and without notice of any claim on the estate, such a man is entitled to the peculiar favor and protection of a court of equity.

Where a court of equity cannot deal directly with the thing which is the subject matter in controversy, but has to reach it through the consciences of the parties, its jurisdiction is necessarily limited to enforcing the fulfillment of their equitable obligations, and cannot extend to compelling the relinquish-

ment of any right or the abandonment of any interest which can be retained consistently with equity and good conscience.

This principle applies especially where the aid of a court of chancery is sought to enforce the surrender of an estate in land. As in such case, the court can only act on the land, through the medium of the parties, it must first inquire whether the party against whom its assistance is sought, is conscientiously bound to comply with the demand urged against him, for if he be not, the case will fall without the scope of a jurisdiction which is founded upon the obligations of conscience. See notes of the American editor to *Basset v. Nosworthy*, 2 Lead. Cas. in Eq. pp. 67, 68, and the authorities there cited. Mitford's Eq. Plead., side p. 135; *Cottrell v. Hughes*, 29 Eng. L. & Eq. R. 358; S. C. 80 Eng. C. L. R. 556; *Wallwyn v. Lee*, 9 Ves. Jr. side p. 25; *Gibler et al. v. Trimble*, 14 Ohio Rep. 340.

In *Jones v. Powles*, 3 Myl. & Keen, 581, the equitable title of the purchaser who had got in the legal estate, depended upon a forged will, and he was held entitled to the protection of the court. In this case a person advanced money upon the mortgage of an estate, which the mortgagor claimed under a will, which ultimately turned out to be forged, and got a conveyance of the legal estate, which was outstanding, in a mortgagee whose debt had been satisfied. On a bill filed by the heiress-at-law, it was held, by SIR JOHN LEACH, M. R., that the mortgagee, being a purchaser without notice of the plaintiff's title, could protect herself by the legal estate. The court observed, that its impression at the opening of the case was, that the protection of the legal estate extended only to cases where the title of the purchaser for valuable consideration without notice, was impeached by reason of some secret act or matter done by the vendor, or those under whom he claimed; but upon full consideration of all the authorities and the dicta of judges and text writers, and the principles upon which the rule is grounded, the court was of opinion that the protection of the legal estate was to be extended not merely to cases in which the title of the purchaser for valuable consideration without notice is impeached by reason of some secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted

could not have been detected by reasonable diligence. 2 Lead. Cas. in Eq. side p. 7. This case is approved by Mr. Sugden in his treatise already cited, p. 417, and is founded upon clear principles of equity; although they would not, here, be applicable to the case of a satisfied mortgage.

It is not deemed necessary to examine in detail, in this opinion, the authorities relied on by the counsel of the defendant in error. Where the benefit of the rule has been denied, the party was found to be affected with notice; and, as we have already stated, it is indispensable for the party holding the legal title, and seeking protection in equity, to show that he is a purchaser for a valuable consideration; that his purchase was in all respects fair, and free from every kind of fraud; and that at the time of his purchase he was not chargeable with notice of the adverse claim.

The conclusion, therefore, at which we have arrived, is, that Dixon cannot be required to surrender the legal title of the unsold land to the plaintiff below, nor to account for the proceeds of the part sold; and that the court erred, in requiring him to do so. But, as before stated, he is under a clear legal liability for the value of the warrant. The judgment of the district court, and of the court of common pleas, is therefore reversed, and the cause remanded to the common pleas for further proceedings.

BRINKERHOFF, C. J., and SCOTT, DAY, and WELCH, JJ. concurred.

FANT *et al.* v. DUNBAR, ADMINISTRATOR, *et al.*

SUPREME COURT, MISSISSIPPI. 1893.

71 Miss. 576.

FROM the chancery court of Noxubee county.

HON. W. T. HOUSTON, Chancellor of the second district, presided by interchange.

In 1871, S. P. Fant died intestate, leaving as his heirs his widow and three minor children, Ida, Iley and S. P. Fant. With the exception of an insurance policy of \$5,000 in favor of his heirs, he left no estate. Soon after his death, Dr. J. C. Fant, qualified as guardian of said minors and collected their interest in the insurance policy, amounting to \$3,660.29, which sum he reported to the court in his inventory and

accounts. Without obtaining an order of court therefor, he immediately loaned the entire amount to a mercantile firm, taking their note for \$4,026.27, due December 23, 1872, which amount included interest to maturity. He reported the loan to the court, which declined to approve it, and the amount, with interest thereon, was carried forward in the accounts of the guardian as being money in his hands, and, in his accounts, he was allowed credit for the interest, which, as the only income of the wards, he had expended for their support. Meantime, in 1873, the firm to which the guardian had loaned the money of said wards, being unable to repay the loan, executed to Dr. Fant, in his own name, a deed to a store-house and lot in Macon, Miss., reciting as the consideration the sum of \$4,099.48, being the amount of the principal and interest due at that time. The deed was executed and delivered with the understanding that it was to stand as a mortgage until January 1, 1874, when, if the debt was not sooner paid, it was to be absolute, and in full payment of the loan and interest. The debt was not paid, and Dr. Fant took possession of the store-house, and continued in possession until his death in 1889, and, during this time, he paid the taxes, insurance and repairs, and collected the rents. At his death, his widow took possession, and has continued in possession ever since.

The guardianship was never settled, and the amount due by Dr. Fant, as guardian, to his said wards, was not paid, and, in March, 1890, Iley W. Fant filed his bill against the heirs of his said guardian, reciting the circumstances of the purchase of the lot as above narrated, and praying that a resulting trust be established in his favor to the extent of a third interest therein. This bill was answered by the defendants, and, apart from the defense noticed in the opinion, many other matters of controversy were introduced into the suit, mostly relating to the course of the guardianship and the rights of the parties growing out of the collection by the guardian of the rents and profits of the lot and his expenditures for taxes, insurance and repairs. In view of the opinion, which is confined to the consideration of a single point, it is not necessary to state the facts touching these matters.

Pending the suit, complainant, Iley W. Fant, died, and the cause was revived in the name of James Dunbar, his administrator. Before a final disposition thereof, S. P. Fant, another of the wards, having come of age, also filed a bill, setting up

substantially the same facts in regard to the guardianship and the purchase of the store-house and lot, but, instead of asking that a trust be declared in his favor as to a one-third interest in the house and lot, he claimed the right of electing whether to take a proportionate interest therein, or to claim an accounting for his money so expended and interest, as constituting a charge on the property.

These two causes were by consent consolidated. The court below rendered a decree finding the facts as to the guardianship and purchase of the property as above stated, and decreeing that the complainants, Iley W. Fant and S. P. Fant, by virtue of the unauthorized loan of their funds, and the purchase by their guardian in his own name of the house and lot in payment of the principal and interest of the loan, became entitled each to a third interest in the house and lot, and a like interest in the rents collected therefrom. On the other hand, the decree allowed, as against the rents, all proper sums expended by the guardian for taxes, insurance and repairs on the property.

The decree also adjusted other matters of controversy between the parties, but the only provision thereof specially noticed by this court is that which gave complainants each a third interest in the house and lot, notwithstanding the consideration of the conveyance thereof to Dr. Fant exceeded by about \$700 the principal of the amount belonging to the wards, which had been loaned to the owners of the property. Although such excess represented interest on the loan, it will be borne in mind that the guardian in his accounts had been allowed for expenditures in behalf of the wards as against this interest, which represented their income. The defendants have appealed.

COOPER, J., delivered the opinion of the court. On the evidence it is entirely certain what part of the purchase-price of the lot described in the pleading and evidence was the money of his wards, and what part was the money of Dr. Fant, the guardian. Under these circumstances, his wards had the right, at their election, to charge their money, with interest, upon the lot, or to take an interest therein proportionate to the amount of their money that went into it as compared to the purchase-price. They have not the right to elect to take the entire interest in the property, for that would be to appropriate not their own but the property of the guardian. Before

making their election, the wards are entitled to have accounts stated in both aspects, and, being thus advised, to elect that which is the more beneficial to them.

*Decree reversed and cause remanded.*¹

JAMES ROSCOE (BOLTON), LIMITED *v.* WINDER.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1914.

[1915] 1 Ch. 62.

THE plaintiff company was in voluntary liquidation and the defendant was the trustee of the property of William Wigham under an administration order in bankruptcy made on July 9, 1913, Wigham having died on June 20, 1913.

By an agreement dated March 13, 1913, Wigham agreed to purchase from the company, for 900*l.*, the goodwill of its business, together with certain assets.

Clause 5 of the agreement was as follows: "The vendors shall permit the purchaser to collect, and the purchaser will collect and get in with all reasonable speed, the book debts of the said business owing at the date hereof without remuneration, and will, on or before April 30 next, pay over to the vendors all moneys received by him on account of such book debts up to that date, such amount to be equal to the gross amount of the debts owing on March 1, 1913, as shown by the books of the vendors. Thereafter all debts then outstanding shall belong to the purchaser."

Wigham paid only part of the 900*l.*

The gross amount of book debts owing on March 1, 1913, was 623*l.* 8*s.* 5*d.*, and Wigham collected and received this amount, namely, 304*l.* 12*s.*, before April 30, 1913, and 318*l.* 16*s.* 5*d.* after April 30, but before or on May 19, 1913, and out of this Wigham paid 455*l.* 18*s.* 11*d.* into his own banking account on or before the lastly named date. He then drew on the account for his own purposes and not in payment for the book debts to the company, with the result that on May

¹ *Wedderburn v. Wedderburn*, 4 Myl. & C. 41; *Primeau v. Granfield*, 184 Fed. 480 (reversed on another ground in s. c., 193 Fed. 911); *Treacy v. Power*, 112 Minn. 226; *Shearer v. Barnes*, 118 Minn. 179; *Holmes v. Gilman*, 138 N. Y. 369, 378 (*semble*); *Dayton v. Clafin Co.*, 19 N. Y. App. Div. 120; *Watson v. Thompson*, 12 R. I. 466, *accord.* But see *In re Hallett's Estate*, *Knatchbull v. Hallett*, 13 Ch. D. 696, 709; *Bresnihan v. Sheehan*, 125 Mass. 11.

21, 1913, the banking account was in credit to the extent of 25*l.* 18*s.* only, and with that exception all moneys previously paid into the account had been drawn out by Wigham. He subsequently paid in and drew out other moneys, including two sums of 118*l.* 3*s.* 5*d.* and 196*l.* 13*s.* 6*d.* (making together 314*l.* 16*s.* 11*d.*) paid out on cheques in favour of his wife, with the result that at the time of his death he had a credit balance at the bank of 358*l.* 5*s.* 5*d.*

The 314*l.* 16*s.* 11*d.* had been paid over by the wife (who made no claim to it) to the defendant, and in the present action the plaintiffs claimed (*inter alia*) a declaration that the plaintiffs were entitled to or alternatively to a lien or charge on the balance of 358*l.* 5*s.* 5*d.* in part payment of or as security for the 455*l.* 18*s.* 11*d.* moneys alleged to have been received by Wigham in trust for the plaintiffs; an order on the defendant to do all acts and things necessary to enable the plaintiffs to be paid the said sums or such part thereof as was required to replace the 455*l.* 18*s.* 11*d.*; and inquiries, accounts, and incidental relief.

The defendant by his defence said that Wigham's banking account was his general banking account into which moneys from many sources were paid by him, and out of which many payments were from time to time made by him; that any moneys received on behalf of Wigham on account of the plaintiffs and paid into the bank had been expended by him, and therefore no part of the credit balance of 358*l.* 5*s.* 5*d.* was money received on account of the plaintiffs, except, perhaps, the 25*l.* 18*s.*; and, while denying liability, the defendant paid into Court the 25*l.* 18*s.*, the credit balance in the bank on May 21, 1913.

SARGANT, J. This is an action which raises a point connected with the decision in *In re Hallett's Estate*, 13 Ch. D. 696, and in which the claim of the plaintiffs, if successful, would result, in my opinion, in a very large extension of the doctrine laid down in that case. [His Lordship referred to the agreement and read clause 5 of it, and continued:] That clause is the really material clause for the present purpose. The gross amount of the book debts owing at the date fixed by the agreement was 623*l.* 8*s.* 5*d.*, and the debtor in fact collected and received that amount. Part of that amount, 304*l.* 12*s.*, was received by him up to April 30, 1913, and the balance, 318*l.* 16*s.* 5*d.*, was received by him after April 30,

but before or on May 19, a date the importance of which will appear later. Out of the amount so received by the debtor he paid the sum of 455*l.* 18*s.* 11*d.* into his general banking account, and at the date of his death, on June 20, 1913, that account showed a credit balance of 358*l.* 5*s.* 5*d.*

What is now claimed in the present action (because one or two other points have been given up) is a charge upon the 358*l.* 5*s.* 5*d.* remaining to the credit of the debtor's account at the time of his death, for the sum of 455*l.* 18*s.* 11*d.* received by him in respect of these book debts and paid into his banking account. That is the strict legal way of putting the claim, but, of course, practically it amounts to claiming the full sum of 358*l.* 5*s.* 5*d.*, since that sum is less than the amount of the charge claimed.

The first point that was taken against the claim was that no trust was created by the agreement as to the book debts to be collected under it. In my opinion, that objection cannot be sustained. It seems to me that the true effect of clause 5 of the agreement is that the purchaser is throughout collecting the book debts on behalf of the vendors, and that he has to pay over the money received on account of the book debts; the language of the clause is express in that respect. No doubt, he has on April 30 to make up to the vendors the full amount of the book debts if he has not by that time received them himself. That is a personal obligation on his part to make up the deficiency, but I do not think that in any way affects his obligation to hand over the actual book debts to the vendors so far as he does in fact receive them. And, incidentally, I think that the concluding words of clause 5, "thereafter all debts then outstanding shall belong to the purchaser," do not mean after April 30, but after the time when the purchaser shall have fulfilled his obligation to make up the deficiency of the book debts collected by him to the full amount. Accordingly, so far as the purchaser did collect these book debts, he did, in my opinion, hold the amount in trust for the vendors.

That being so, we have a case where, as in *In re Hallett's Estate*, 13 Ch. D. 696, the banking account of the debtor comprised not only moneys belonging to himself for his own purposes, but also moneys belonging to him upon trust for some one else, and that being so, and apart from the circumstance I am going to mention, it seems to me clear that the

plaintiffs would be entitled to the charge they claim, and to receive the whole balance of 358*l.* 5*s.* 5*d.* standing to the debtor's credit at the time of his death, and that although there had been payments out of the account which, under the rule in Clayton's Case, (1816) 1 Mer. 572, would have been attributable to the earlier payments in.

In re Hallett's Estate, 13 Ch. D. 696, which would but for the circumstance I am going to mention entirely conclude this case, decided two clear points: First, that when a trustee mixes trust moneys with private moneys in one account the *cestuis que trust* have a charge on the aggregate amount for their trust fund; and, secondly, that when payments are made by the trustee out of the general account the payments are not to be appropriated against payments in to that account as in Clayton's Case, (1816) 1 Mer. 572, because the trustee is presumed to be honest rather than dishonest and to make payments out of his own private moneys and not out of the trust fund that was mingled with his private moneys.

But there is a further circumstance in the present case which seems to me to be conclusive in favour of the defendant as regards the greater part of the balance of 358*l.* 5*s.* 5*d.* It appears that after the payment in by the debtor of a portion of the book debts which he had received the balance at the bank on May 19, 1913, was reduced by his drawings to a sum of 25*l.* 18*s.* only on May 21. So that, although the ultimate balance at the debtor's death was about 358*l.*, there had been an intermediate balance of only 25*l.* 18*s.* The result of that seems to me to be that the trust moneys cannot possibly be traced into this common fund, which was standing to the debtor's credit at his death, to an extent of more than 25*l.* 18*s.*, because, although *prima facie* under the second rule in *In re Hallett's Estate*, 13 Ch. D. 696, any drawings out by the debtor ought to be attributed to the private moneys which he had at the bank and not to the trust moneys, yet, when the drawings out had reached such an amount that the whole of his private money part had been exhausted, it necessarily followed that the rest of the drawings must have been against trust moneys. There being on May 21, 1913, only 25*l.* 18*s.* in all, standing to the credit of the debtor's account, it is quite clear that on that day he must have denuded his account of all the trust moneys there — the whole 455*l.* 18*s.* 11*d.* — except to the extent of 25*l.* 18*s.*

Practically, what Mr. Martelli and Mr. Hansell have been asking me to do — although I think Mr. Hansell in particular rather disguised the claim by the phraseology he used — is to say that the debtor, by paying further moneys after May 21 into this common account, was impressing upon those further moneys so paid in the like trust or obligation, or charge of the nature of a trust, which had formerly been impressed upon the previous balances to the credit of that account. No doubt, Mr. Hansell did say, "No. I am only asking you to treat the account as a whole, and to consider the balance from time to time standing to the credit of that account as subject to one continual charge or trust." But I think that really is using words which are not appropriate to the facts. You must, for the purpose of tracing, which was the process adopted in *In re Hallett's Estate*, 13 Ch. D. 696, put your finger on some definite fund which either remains in its original state or can be found in another shape. That is tracing, and tracing, by the very facts of this case, seems to be absolutely excluded except as to the 25*l.* 18*s.*

Then, apart from tracing, it seems to me possible to establish this claim against the ultimate balance of 358*l.* 5*s.* 5*d.* only by saying that something was done, with regard to the additional moneys which are needed to make up that balance, by the person to whom those moneys belonged, the debtor, to substitute those moneys for the purpose of, or to impose upon those moneys a trust equivalent to, the trust which rested on the previous balance. Of course, if there was anything like a separate trust account, the payment of the further moneys into that account would, in itself, have been quite a sufficient indication of the intention of the debtor to substitute those additional moneys for the original trust moneys, and accordingly to impose, by way of substitution, the old trusts upon those additional moneys. But, in a case where the account into which the moneys are paid is the general trading account of the debtor on which he has been accustomed to draw both in the ordinary course and in breach of trust when there were trust funds standing to the credit of that account which were convenient for that purpose, I think it is impossible to attribute to him that by the mere payment into the account of further moneys, which to a large extent he subsequently used for purposes of his own, he intended to clothe those moneys with a trust in favour of the plaintiffs.

Certainly, after having heard *In re Hallett's Estate*, 13 Ch. D. 696, stated over and over again, I should have thought that the general view of that decision was that it only applied to such an amount of the balance ultimately standing to the credit of the trustee as did not exceed the lowest balance of the account during the intervening period. That view has practically been taken, as far as I can make out, in the cases which have dealt with *In re Hallett's Estate*, 13 Ch. D. 696. *In re Oatway*, [1903] 2 Ch. 356, a decision of JORCE, J., was cited to me in support of the plaintiffs' case, but I do not find anything in it to help them. All that JORCE, J., did in that case was to say that, if part of the mixed moneys can be traced into a definite security, that security will not become freed from the charge in favour of the trust, but will, together with any residue of the mixed moneys, remain subject to that charge. I am sure that nothing which he said was intended to mean that the trust was imposed upon any property into which the original fund could not be traced. The head-note to the decision of NORTH, J., in *In re Stenning*, [1895] 2 Ch. 433, which accurately represents the effect of the case) is stated in such terms as to indicate that the application of the doctrine in *In re Hallett's Estate*, 13 Ch. D. 696, implied that there should be a continuous balance standing to the credit of the account equal to the balance against which the charge is sought to be enforced. And certainly in the recent case of *Sinclair v. Brougham*, [1914] A. C. 398, I can see nothing in any way to impeach the doctrine as to tracing laid down in *In re Hallett's Estate*, 13 Ch. D. 696.

In my opinion, therefore, the only part of the balance of 358*l.* 5*s.* 5*d.* which can be made available by the plaintiffs is the sum of 25*l.* 18*s.*, being the smallest amount to which the balance, to the credit of the account had fallen between May 19, 1913, and the death of the debtor.¹

¹ *Mercantile Trust Co. v. St. Louis & S. F. Ry. Co.*, 99 Fed. 485; *In re Mulligan*, 116 Fed. 715 (*semble*); *Bank of British N. A. v. Freights*, 127 Fed. 859 (affirmed s. c., 137 Fed. 534); *American Can Co. v. Williams*, 178 Fed. 420; *In re M. E. Dunn & Co.*, 193 Fed. 212; *Powell v. Missouri Co.*, 99 Ark. 553; *Woodhouse v. Crandall*, 197 Ill. 104; *Waddell v. Waddell*, 36 Utah 435; *State v. Foster*, 5 Wyo. 199, *accord*.

If there is always an amount in the fund equal to or greater than the amount of the plaintiff's claim, the plaintiff will be able to get full satisfaction of his claim. *In re Hallett's Estate*, *Knatchbull v. Hallett*, 13 Ch. D. 696, 731; *Massey v. Fisher*, 62 Fed. 958; *Hutchinson v. Le Roy*, 113 Fed. 202;

In re OATWAY.
HERTSLET *v.* OATWAY.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1903.

[1903] 2 Ch. 356.

THIS was a creditor's action for the administration of the estate of Lewis John Oatway, a solicitor, who died insolvent in 1902. The defendant Christiana Mary Oatway was his sole executrix. In the course of the administration a question arose as to the title to a sum of 2474*l.* 19*s.*, being the proceeds of sale of 1000 shares in a company called the Oceana Company, which at the date of the testator's death were standing in his name.

The testator and one Maxwell Skipper were co-trustees under the will of Charles Skipper, deceased. In 1899 and 1900 sums amounting to 3000*l.* were advanced in breach of

In re Royea's Estate, 143 Fed. 182; *Smith v. Mottley*, 150 Fed. 266; *Butler v. Western German Bank*, 159 Fed. 116; *In re* Stewart, 178 Fed. 463; *Southern Cotton Oil Co. v. Elliotte*, 218 Fed. 567; *Elizalde v. Elizalde*, 137 Cal. 634; *Whitcomb v. Carpenter*, 134 Iowa 227; *Fogg v. Tyler*, 109 Me. 109; *Board of Fire & Water Commissioners v. Wilkinson*, 119 Mich. 655; *Patek v. Patek*, 166 Mich. 446; *Blair v. Hill*, 50 N. Y. App. Div. 33 (affirmed *s. c.*, 165 N. Y. 672); *Widman v. Kellogg*, 22 N. D. 396; *Emigh v. Earling*, 134 Wis. 565.

If the fund is wholly drawn out and dissipated, the claimant is relegated to a mere personal claim against the wrongdoer. *Schuyler v. Littlefield*, 232 U. S. 707; *Beard v. Independent District*, 88 Fed. 375; *Hewitt v. Hayes*, 205 Mass. 356; *Re* Assignment of Bank of Oregon, 32 Ore. 84.

On the question, however, how far additions by the wrongdoer may be regarded as a restoration of the money withdrawn, see *Ex parte Kingston*, L. R. 6 Ch. App. 632; *State Savings Bank v. Thompson*, 128 Pac. 1120 (Kan. 1913); *Supreme Lodge v. Liberty Trust Co.*, 215 Mass. 27; *Jeffray v. Towar*, 63 N. J. Eq. 530, 546; *Van Alen v. American National Bank*, 52 N. Y. 1; *Baker v. N. Y. Bank*, 100 N. Y. 31; *United National Bank v. Weatherby*, 70 N. Y. App. Div. 279. Compare *Sharp v. Jackson*, [1899] A. C. 419 (affirming *New v. Hunting*, [1897] 2 Q. B. 19); *Taylor v. London and County Banking Co.*, [1901] 2 Ch. 231, 254; *In re Cozens*, [1913] 2 Ch. 478. See *In re Northrup*, 152 Fed. 763. Compare the analogous cases where a broker wrongfully disposes of a customer's stock, such as *Gorman v. Littlefield*, 229 U. S. 19.

For cases in which the wrongdoer commingled the money of two persons without contributing any money of his own and subsequently made withdrawals, see *In re Hallett's Estate*, *Knatchbull v. Hallett*, 13 Ch. D. 696; *Hancock v. Smith*, 41 Ch. D. 456 (*semble*); *In re Stenning*, [1895] 2 Ch. 433; *Mutton v. Peat*, [1899] 2 Ch. 556, 560 (*semble*); *Empire State Surety Co. v. Carroll County*, 194 Fed. 593, 605; *Hewitt v. Hayes*, 205 Mass. 356. But see *In re Mulligan*, 116 Fed. 715, 719.

trust out of Charles Skipper's estate to Maxwell Skipper upon the security of a mortgage of an undivided share of certain real estate to which he was entitled under his grandfather's will. In 1901 Maxwell Skipper went abroad, having given to Oatway a power of attorney under which and as mortgagee he on August 15, 1901, sold Maxwell Skipper's reversionary interest for the sum of 7000*l.* This sum Oatway paid into his own banking account, which at that time was in credit to the extent of 77*l.* 13*s.* 4*d.* He did not replace the 3000*l.* which had been advanced to Maxwell Skipper out of Charles Skipper's trust estate.

On August 15, 1901, Maxwell Skipper was indebted to Oatway in the sum of 1779*l.* 7*s.* 1*d.*, and also in a further unascertained amount in respect of costs.

On August 24, 1901, Oatway purchased the Oceana shares for 2137*l.* 12*s.* 3*d.*, which he paid for by a cheque on his banking account. Before the purchase of the shares Oatway had made further payments into the account to the extent of 30*l.* 1*s.* 11*d.*, and had drawn out sums amounting to 510*l.* 8*s.* 6*d.*; so that when he drew the cheque for 2137*l.* 12*s.* 3*d.* in payment for the shares the credit balance of his account was 6635*l.* 6*s.* 4*d.*, which sum included the 3000*l.* belonging to the estate of Charles Skipper.

After paying for the shares, Oatway paid further sums into the account, but his subsequent drawings for his own purposes exhausted the whole amount standing to his credit, and there was nothing to represent the 3000*l.* except the proceeds of the Oceana shares.

This was a summons taken out by Maxwell Skipper, who was also a defendant to the action, asking that the sum of 2474*l.* 19*s.*, being the proceeds of the Oceana shares, might be paid to him either in his personal capacity or as trustee under the will of Charles Skipper.

Austen-Cartmell, for the applicant. Oatway was bound when he received the 7000*l.* to replace the 3000*l.*, which, in breach of trust, had been advanced to Maxwell Skipper out of Charles Skipper's estate. He then had to account to Maxwell Skipper for the balance of the 7000*l.* The whole of the 7000*l.* having disappeared except that which can be traced into the Oceana shares, the proceeds of those shares clearly belong to the applicant either personally or as trustee.

In a case of this sort the second part of the holding in *In re Hallett's Estate*, 13 Ch. D. 696, does not apply. It cannot be said that the shares were bought by Oatway out of his own money, and that therefore he is entitled to hold them as against the beneficiaries under Charles Skipper's will. Where a trustee has mixed trust money with his own and has purchased land or chattels out of the mixed fund, the beneficial owner can follow the trust money and is entitled to a charge on the purchased property: *In re Hallett's Estate*, 13 Ch. D. 696. The applicant does not desire to press his personal claim to the proceeds of the shares, provided that the Skipper trust gets the benefit of them; but he submits that he is entitled to recover against Oatway's estate.

Younger, K. C., and *Ashworth James*, for the plaintiffs, who were beneficiaries under Charles Skipper's will. The proceeds of the Oceana shares clearly belong to the Skipper trust.

Dibdin, K. C., *A. Whitaker*, and *Crossfield*, for the defendant Christiana Mary Oatway. When Oatway bought the shares the balance to his credit at the bank was sufficient to enable him to pay for them apart from the 3000*l.* trust money. The proceeds of the shares belong to Oatway's estate. It was his own money which he drew out to pay for them. He was entitled as against Maxwell Skipper to do that: *In re Hallett's Estate*, 13 Ch. D. 696.

Cur. adv. vult.

May 2. *Joyce, J.* Oatway was co-trustee with Maxwell Skipper of the will of Charles Skipper, the father of the latter. In breach of trust 3000*l.* was advanced from the trust to Maxwell Skipper upon the security of a mortgage given by him to Oatway alone. Oatway, as mortgagee, and under a power of attorney from Maxwell Skipper, sold the mortgaged property, and as mortgagee received and gave a receipt for the 3000*l.* trust money, part of the proceeds of sale, which amounted to 7000*l.* The rest he received as agent of or on behalf of Maxwell Skipper, from whom he held a power of attorney. Oatway, instead of investing the 3000*l.* upon proper trust securities in the joint names of himself and Maxwell Skipper, the trustees, paid in the whole 7000*l.* on August 15, 1901, to his own banking account, which was then in credit to the amount of 77*l.* 13*s.* 4*d.* Between August 15 and 24 he paid in sums amounting to 30*l.* and drew out 510*l.*,

which he paid away to creditors or otherwise applied to his own purposes in such a manner as to be irrecoverable.

On August 24, out of the balance to the credit of the account, Oatway paid 2137*l.* 12*s.* 3*d.* for the purchase of certain shares in the Oceana Company, which remained in his name at the time of his decease, and have since been sold by arrangement. It is the proceeds of these shares which is now in question. The balance to the credit of the account after this payment, with some other sums paid in from time to time by Oatway, was subsequently exhausted by his drawings on his own account.

The balance of the 7000*l.*, after discharging the mortgage, belonged to Maxwell Skipper, but it is alleged that Oatway as a creditor of his had claims thereon to a large amount. Maxwell Skipper, who was himself a party to the original breach of trust, could not under the circumstances, and in fact does not, oppose the claim of the trust to the proceeds of the Oceana shares. For the purposes of this case we may consider Oatway to have been entitled to the balance of the 7000*l.* after discharging the 3000*l.* mortgage.

There is no conflict between different fiduciary owners or sets of *cestuis que trust*. It is a principle settled as far back as the time of the Year Books that, whatever alteration of form any property may undergo, the true owner is entitled to seize it in its new shape if he can prove the identity of the original material: see Blackstone, vol. ii. p. 405, and *Lupton v. White*, (1808) 15 Ves. 432; 10 R. R. 94. But this rule is carried no farther than necessity requires, and is applied only to cases where the compound is such as to render it impossible to apportion the respective shares of the parties. Thus, if the quality of the articles that are mixed be uniform, and the original quantities known, as in the case of so many pounds of trust money mixed with so many pounds of the trustee's own money, the person by whose act the confusion took place is still entitled to claim his proper quantity, but subject to the quantity of the other proprietor being first made good out of the whole mass: 2 Stephen's Commentaries (13th ed.), 20. Trust money may be followed into land or any other property in which it has been invested; and when a trustee has, in making any purchase or investment, applied trust money together with his own, the *cestuis que trust* are entitled to a charge on the property purchased for the amount of the trust

money laid out in the purchase or investment. Similarly, if money held by any person in a fiduciary capacity be paid into his own banking account, it may be followed by the equitable owner, who, as against the trustee, will have a charge for what belongs to him upon the balance to the credit of the account. If, then, the trustee pays in further sums, and from time to time draws out money by cheques, but leaves a balance to the credit of the account, it is settled that he is not entitled to have the rule in *Clayton's Case*, (1816) 1 Mer. 572; 15 R. R. 161, applied so as to maintain that the sums which have been drawn out and paid away so as to be incapable of being recovered represented *pro tanto* the trust money, and that the balance remaining is not trust money, but represents only his own moneys paid into the account. *Brown v. Adams*, L. R. 4 Ch. 764, to the contrary ought not to be followed since the decision in *In re Hallett's Estate*, 13 Ch. D. 696. It is, in my opinion, equally clear that when any of the money drawn out has been invested, and the investment remains in the name or under the control of the trustee, the rest of the balance having been afterwards dissipated by him, he cannot maintain that the investment which remains represents his own money alone, and that what has been spent and can no longer be traced and recovered was the money belonging to the trust. In other words, when the private money of the trustee and that which he held in a fiduciary capacity have been mixed in the same banking account, from which various payments have from time to time been made, then, in order to determine to whom any remaining balance or any investment that may have been paid for out of the account ought to be deemed to belong, the trustee must be debited with all the sums that have been withdrawn and applied to his own use so as to be no longer recoverable, and the trust money in like manner be debited with any sums taken out and duly invested in the names of the proper trustees. The order of priority in which the various withdrawals and investments may have been respectively made is wholly immaterial. I have been referring, of course, to cases where there is only one fiduciary owner or set of *cestuis que trust* claiming whatever may be left as against the trustee. In the present case there is no balance left. The only investment or property remaining which represents any part of the mixed moneys paid into the banking account is the *Oceana* shares purchased

for 2137l. Upon these, therefore, the trust had a charge for the 3000l. trust money paid into the account. That is to say, those shares and the proceeds thereof belong to the trust.

It was objected that the investment in the Oceana shares was made at a time when Oatway's own share of the balance to the credit of the account (if the whole had been then justly distributed) would have exceeded 2137l., the price of the shares; that he was therefore entitled to withdraw that sum, and might rightly apply it for his own purposes; and that consequently the shares should be held to belong to his estate. To this I answer that he never was entitled to withdraw the 2137l. from the account, or, at all events, that he could not be entitled to take that sum from the account and hold it or the investment made therewith, freed from the charge in favour of the trust, unless or until the trust money paid into the account had been first restored, and the trust fund reinstated by due investment of the money in the joint names of the proper trustees, which never was done.

The investment by Oatway, in his own name, of the 2137l. in Oceana shares no more got rid of the claim or charge of the trust upon the money so invested, than would have been the case if he had drawn a cheque for 2137l. and simply placed and retained the amount in a drawer without further disposing of the money in any way. The proceeds of the Oceana shares must be held to belong to the trust funds under the will of which Oatway and Maxwell Skipper were the trustees.¹

¹ See *Primeau v. Granfield*, 184 Fed. 480 (reversed on another ground in s. c., 193 Fed. 911); *In re A. O. Brown & Co.*, 189 Fed. 432; *Brennan v. Tillinghast*, 201 Fed. 609; *City of Lincoln v. Morrison*, 64 Neb. 822, 831; *Lamb v. Rooney*, 72 Neb. 322. But see *Board of Commissioners v. Strawn*, 157 Fed. 49; *In re City Bank of Dowagiac*, 186 Fed. 413; *In re Brown*, 193 Fed. 24 (affirmed, without mention of this point, *sub nom.* *First Nat. Bank v. Littlefield*, 226 U. S. 110); *Empire State Surety Co. v. Carroll County*, 194 Fed. 593; *Covey v. Cannon*, 104 Ark. 550; *Bright v. King*, 20 Ky. Law Rep. 186; *Standish v. Babcock*, 52 N. J. Eq. 628; *Waddell v. Waddell*, 36 Utah 435.

In *City of Lincoln v. Morrison*, 64 Neb. 822, a part of the commingled fund was used in buying property which was sold at a profit. The claimant was allowed to reach this profit.

SPOKANE COUNTY *v.* FIRST NATIONAL BANK
OF SPOKANE, *et al.*

CIRCUIT COURT OF APPEALS, U. S., NINTH CIRCUIT. 1895.
68 Fed. 979.

APPEAL from the Circuit Court of the United States for the Eastern Division of the District of Washington.

This was a suit by the county of Spokane, Wash., against the First National Bank of Spokane and F. Lewis Clark, its receiver, to impress a trust upon assets of the bank in the receiver's hands. The circuit court sustained a demurrer to the bill for want of equity. Complainant appeals. Affirmed.

Before McKENNA and GILBERT, Circuit Judges, and KNOWLES, District Judge.

GILBERT, Circuit Judge. The county of Spokane brought a suit against the First National Bank of Spokane and its receiver to recover the balance of public funds deposited with said bank by the treasurer and tax collector of said county between the 9th day of January, 1893, and the 26th day of July of the same year, alleging that between said dates there was deposited with said bank by said officer for safe-keeping \$81,257.55, all of which had been repaid to the complainant save and except the sum of \$11,355.68, "which said sum the said defendant the First National Bank does now wrongfully retain and hold, and has wrongfully retained and held ever since the 26th day of July, 1893." It is further alleged in the bill that on or about the 26th day of July, 1893, the bank became insolvent and suspended payment, and has not since resumed business, and that the receiver, since his appointment as such, has received of the assets of the said bank "sufficient money and funds wherewith to pay and satisfy the said balance deposited and received as aforesaid." A demurrer to the bill for want of equity was sustained by the circuit court, and from that ruling this appeal is taken.

It is contended on behalf of the appellant that the money deposited with the bank by the county treasurer was impressed with the character of a trust fund, and that the trust may be enforced against any assets of the bank in the hands of its receiver. It is not alleged in the bill that any of the money of the complainant, or any assets or property thereby procured, has come into the hands of the receiver. It is true it

is averred that the bank still retains \$11,355.68 of the complainant's money, but it is not said that any portion of that sum was in the possession of the bank when it closed its doors. We interpret the averments of the bill to mean, as in fact it was conceded upon the argument, that the money which the receiver holds is not that which was turned over to him as such when the bank was closed, but that it is the proceeds of collections by him made since that date. If it had been alleged in the bill that at the time of its failure the bank held a sum of money equal to or less than the amount here sued for, the court might lawfully presume that sum to be of the public funds of Spokane county, since it will be presumed that trust funds have not been wrongfully misappropriated or criminally used by the officers of the bank. But while that presumption would prevail as to money on hand, it would not be extended to other assets, for the officers of the bank had as little right to divert the public funds into investment in other property as they had to appropriate them to their own use. But it is said that the complainant has a lien upon the funds in the hands of the receiver upon the theory that the estate of the bank has received the benefit of the complainant's money, and its present assets are thereby increased. There are some decisions of the courts, particularly in cases of suit to recover public funds, that go to the extent of supporting this doctrine, and while the public benefit to be derived from the application of that rule to cases where school and county funds have been misappropriated by banks appeals strongly to the consideration of the court, we are unable to discover that the power to dispense such relief rests upon any of the established principles which govern the action of courts of equity.

There is no recognized ground upon which equity can pursue a fund and impose upon it the character of a trust, except upon the theory that the money is still the property of the plaintiff. If he is permitted to follow it and recover it, it is because it is his own, whether in the form in which he parted with its possession, or in a substituted form. Under the earlier rule, he was required to identify it as the very property which he had confided to another. The newer and more equitable doctrine permits him to recover it from any one not an innocent purchaser, and in any shape into which it may have been transmuted, provided he can establish the fact

that it is his property or the proceeds of his property, or that his property has gone into it and remains in a mass from which it cannot be distinguished. The earlier English doctrine, as declared in the opinion of Lord ELLENBOROUGH in *Taylor v. Plumer*, 3 Maule & S. 575, in which were reviewed the prior decisions of the English courts, was to the effect that the owner of property intrusted to another could follow and retake the same from the possession of the holder, whether he were agent, bailee, or trustee, or from others who were in privity with him, so long as they were not *bona fide* purchasers for value, and this irrespective of whether such property remained in its original form or had been changed into some other form, so long as it could be ascertained to be the same property or the proceeds of the same property, but that the right ceased when the means of ascertainment failed, and it was held that such means of ascertainment failed whenever the property was in the form of money, and had been then mixed and confused in a general mass of money of the same description. The more recent doctrine, however, follows the rule announced in *Re Hallett's Estate* (*Knatchbull v. Hallett*) 13 Ch. Div. 696, which is that, if money held by one in a fiduciary character has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, and that if the depositor has commingled it with his own funds at the bank, and has afterwards drawn out sums upon checks in the ordinary manner, he must be held to have drawn out his own money in preference to the trust money, and that if he destroyed the trust fund "by dissipating it altogether, there remains nothing to be the subject of the trust, but so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust."

The American courts, while uniformly approving the doctrine of that decision, have exhibited a diversity of holding as to its meaning. Some, as we have shown, have interpreted it to mean that, in a suit brought to pursue trust property and affix upon it the character of a trust, it is only necessary to show that the defendant's estate, although insolvent and in the hands of an assignee or receiver for distribution, has actually received the benefit of the trust fund, and that it makes no difference that the plaintiff is unable to show that

his fund, or property which represents it, is then in the estate in any form, or has actually come into the hands of the assignee or receiver. *Harrison v. Smith*, 83 Mo. 216; *Jones v. Kilbreth* (Ohio) 31 N. E. 346; *Independent Dist. v. King*, 80 Iowa, 497, 45 N. W. 908; *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499; *McLeod v. Evans*, 66 Wis. 401, 28 N. W. 173, 214; *Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. 1049; *Myers v. Board of Ed.*, 51 Kan. 87, 32 Pac. 658; *San Diego Co. v. California Nat. Bank*, 52 Fed. 59. Decision in these cases would seem in the main to have been influenced by the consideration that the estate of the insolvent, and thereby the general creditors thereof, must have received the benefit of all trust funds unlawfully used by the insolvent in the course of business or the payment of debts. Said the court in *Peak v. Ellicott*:

"As the estate was augmented by the conversion of the trust fund, no reason is seen under the equitable principle which has been mentioned why they should not become a charge upon the entire estate."

In *Plow Co. v. Lamp*, 80 Iowa, 722, 45 N. W. 1049, the court said:

"The creditors, if permitted to enforce their claims as against the trust, would secure the payment of their claims out of trust moneys."

In *Harrison v. Smith*, the court said, while it would "be impossible to make it a charge upon the estate or assets to the increase or benefit of which it has been appropriated, the general assets of the bank having received the benefit, there is nothing inequitable in charging them with the amount of the converted fund."

We are unable to assent to the proposition that, because a trust fund has been used by the insolvent in the course of his business, the general creditors of the estate are by that amount benefited, and that therefore equitable considerations require that the owner of the trust fund be paid out of the estate to their postponement or exclusion. If the trust fund has been dissipated in the transaction of the business before insolvency, it will be impossible to demonstrate that the estate has been thereby increased or better prepared to meet the demands of creditors, and even if it is proven that the trust fund has been but recently disbursed, and has been used to pay debts that otherwise would be claims against the estate, there would be manifest inequity in requiring that the money so paid out should

be refunded out of the assets, for in so doing the general creditors whose demands remain unpaid are in effect contributing to the payment of the creditors whose demands have been extinguished by the trust fund. Both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant. *Little v. Chadwick*, 151 Mass. 109, 23 N. E. 1005; *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504; *Association v. Austin* (Ala.) 13 South. 908; *Shields v. Thomas* (Miss.) 14 South. 85; *Silk Co. v. Flanders* (Wis.) 58 N. W. 383; *Slater v. Oriental Mills* (R. I.) 27 Atl. 443; *Bank v. Armstrong*, 39 Fed. 684; *Multnomah Co. v. Bank*, 61 Fed. 912; *Massey v. Fisher*, 62 Fed. 958.

*The decree is therefore affirmed, with costs to the appellees.*¹

SLATER *et al.* v. ORIENTAL MILLS *et al.*

SUPREME COURT, RHODE ISLAND. 1893.

18 R. I. 352.

BILL IN EQUITY to establish a charge upon an assigned estate.

July 12, 1893. STINESS, J. The question, raised by the demurrer to the bill, is whether the Forestdale Manufacturing Company, of which the complainants are stockholders, has a preferred claim upon the respondent assignee of the Oriental Mills, an insolvent corporation, for funds wrongfully taken from the former company and used to pay liabilities of the latter company, and otherwise, by persons who were officers in control of both companies.

The rule is clear that one has an equitable right to follow and reclaim his property, which has been wrongfully appropriated by another, so long as he can find the property, or its substantial equivalent if its form has been changed, upon the ground that such property, in whatever form, is impressed with a trust in favor of the owner. If the trustee has mingled it with his own, he will be deemed to have used his own, rather than another's, and so to leave the remainder under the trust; and this is a sufficient identification for the owner. But in

¹ See *Board of Commissioners v. Strawn*, 157 Fed. 49, 15 L. R. A. (N. S.) 1100; *In re Larkin*, 202 Fed. 572; *Lowe v. Jones*, 192 Mass. 94; *Jaffe v. Weld*, 155 N. Y. App. Div. 110.

this case we are asked to go further and to hold that where one's property has been wrongfully applied and dissipated by another a charge remains upon the estate of the latter for the amount thus wrongfully taken, upon the ground that his estate is thereby so much larger and that the trust property is really and clearly there, in a substituted form, although it cannot be directly traced. This view is pressed with much skill and some authority, but we are unable to adopt it.

While one who has been wronged may follow and take his own property, or its visible product, it is quite a different thing to say that he may take the property of somebody else. The general property of an insolvent debtor belongs to his creditors, as much as particular trust property belongs to a *cestui que trust*. Creditors have no right to share in that which is shown not to belong to the debtor, and conversely a claimant has no right to take from creditors that which he cannot show to be equitably his own. But right here comes the argument that it is equitably his own because the debtor has taken the claimant's money and mingled it with his estate, whereby it is swelled just so much. But, as applicable to all cases, the argument is not sound. Where the property or its substantial equivalent remains, we concede its force; but where it is dissipated and gone, the appropriation of some other property in its stead simply takes from creditors that which clearly belongs to them. In the former case, as in *Pennell v. Deffell*, 4 DeG., M. & G. 372, and *In re Hallett's estate*, *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696, the illustration may be used of a debtor mingling trust funds with his own in a chest or bag. Though the particular money cannot be identified, the amount is swelled just so much, and the amount added belongs to the *cestui que trust*. But in the latter case there is no swelling of the estate, for the money is spent and gone; or, as respondent's counsel pertinently suggests, "Knight Bruce's chest, — Jessel's bag, is empty." Shall we therefore order a like amount to be taken out of some other chest or bag, or out of the debtor's general estate? Suppose the general estate consists only of mills and machinery acquired long before the complainant's money was appropriated. Upon what principle could that property be taken to reimburse them? But the complainants say: "Our money has been misappropriated by the debtor without our consent and without our fault; why should we not be reimbursed out of his estate?" Undoubtedly is it right that every one should have his own; but, when a

claimant's property cannot be found, this same principle prevents the taking of property which equitably belongs to creditors of the trustee to make it up. The creditors have done no wrongful act, and should not be called upon, in any way, to atone for the misconduct of their debtor. It is an ordinary case of misfortune on the part of claimants, whose confidence in a trustee or agent has been abused.

In examining the question upon authority we think it is equally clear that there can be no equitable relief except in cases where the fund claimed is in some way apparent in the debtor's estate. Of the cases cited by the complainants only four go to the extent of holding that a *cestui que trust* is entitled to a lien for reimbursement on the general estate of the trustee where the trust fund does not, in some form, so appear. These are *Davenport Plow Co. v. Lamp*, 80 Iowa, 722; *McLeod v. Evans*, 66 Wisc. 401; *Francis v. Evans*, 69 Wisc. 115; *Bowers v. Evans*, 71 Wisc. 133. In the first of these cases the court lost sight of the distinction, which we desire to make clear, between funds remaining in the estate, which go to swell the assets, and funds which, having been dissipated or used in the payment of debts, do not remain in the estate, and so do not swell the estate. Upon the former fact, as we have stated above, we concede the right to relief. But the court, in the Iowa case, seems to ignore this very important distinction, and in so doing overthrows the foundation on which its decision is based. For it says: "The creditors, if permitted to enforce their claims as against the trust, would secure the payment of their claims out of trust moneys." Now how can this be so if the trust moneys, or their substantial equivalent, are not there? The court assumes that the payment of debts is the same thing as an increase of assets; or, perhaps, that it works the same result to a creditor by increasing his dividends. But this is not so. How the satisfaction of a debt by incurring another of equal amount either decreases one's liabilities or increases his assets can only be comprehended by the philosophic mind of a Micawber. If a debtor is solvent it is all right either way, because he will have enough to pay everything he owes. But if he is insolvent the injustice of the doctrine of the Iowa court is made almost painfully plain by the following illustration, from the dissenting opinion of TAYLOR and CASSODAY, JJ., in *Francis v. Evans*, *supra*. "Supposing that an insolvent debtor, D., has only \$1,000 of property, but is indebted to the amount of \$2,000, one-half of which is

due to A., and the other half to B. In this condition of things, D.'s property can only pay fifty per cent of his debts. By such distribution, A. and B. would each be equitably entitled to \$500. Now, suppose D., while in that condition, collects \$1,000 for F., but instead of remitting to him the money, as he should, he uses it in paying his debt in full to A. By so doing, D. has not increased his assets a penny, nor diminished his aggregate indebtedness a penny. The only difference is that he now owes \$1,000 each to B. and F., whereas he previously owed \$1,000 each to A. and B. Now, if F. is to have preference over B., then his claim will absorb the entire amount of D.'s property, leaving nothing whatever for B. In other words, the \$500 to which B. was equitably entitled from his insolvent debtor, upon a fair distribution of the estate, has, without any fault of his, been paid to another, merely in consequence of the wrongful act of the debtor." It is impossible to state the case more clearly. The illustration demonstrates that the mere fact that a trustee has used the money, does not show that it has gone into his estate. If used to pay debts, he has simply turned it over to a creditor, thereby giving him a preference, while his own estate and indebtedness remain exactly as before; because he owes the same amount to his *cestui que trust* from whom he has taken it. Suppose he had stolen the money and turned it over to somebody from whom it could not be reclaimed. Can anyone say the owner should have an equitable lien upon the thief's insolvent estate in preference to his creditors? They and the owner are equally innocent, and each must bear his own misfortune. There seems to be some confusion also upon the ground that because there might be an equitable lien upon the trustee's property in his own hands, the same lien must follow it into the hands of the assignee, because he has no greater rights than the assignor. The assignee is primarily a trustee for creditors, yet it is indeed true that he has no greater right than the assignor to specific property. But suppose, after a creditor had attached property in possession of a debtor, a complainant should seek an equitable lien upon it for the reason that the debtor had misappropriated property which belonged to the complainant, and of which the attached property was in no way a part. We see no ground upon which he could succeed. When the creditor seeks to establish his lien for his debt he stands equal in equitable right with a claimant who can show no peculiar equitable claim to the property in question. The

fact that the *cestui que trust* has not entered into the relation of debtor and creditor with the trustee does not affect the question. So long as he seeks to recover what he can show to be his own, he is in the position of an owner; but when he cannot do this and seeks to recover payment out of the trustee's general estate he is in the position of a creditor. Substantially the same criticisms are applicable to the Wisconsin cases, with the additional remarks that they are decisions of a court nearly evenly divided, and that in our opinion, the better reason and weight of authority are with the dissentient judges.

In support of the views we have expressed it is sufficient to select the following cases: *Little v. Chadwick*, 151 Mass. 109; *National Bank v. Insurance Company*, 104 U. S. 54; *Matter of Cavin v. Gleason*, 105 N. Y. 256; *Englar v. Offutt*, 70 Md. 78; *Thompson's Appeal*, 22 Pa. St. 16; *Commercial National Bank v. Armstrong*, 39 Federal Reporter, 684. The question whether any of the property of the Forestdale Company has gone into the hands of the assignee, in original or substituted form, whereby the assets are so much larger, is a question of fact. As to the sum of \$149.39 on deposit in the Columbian National Bank of Boston, no question being made that it was a part of the funds of the Forestdale Company, it may, according to *National Bank v. Insurance Company*, 104 U. S. 54, be claimed by the owner; but that question cannot be determined in this suit, as the money is not in the hands of the assignee, and the bank is not a party to the suit. As to the \$3,103.33 invested in cotton and made into manufactured goods, following the doctrine of the cases cited, the court will attribute ownership in such goods, if any such came to the assignee, to be in the *cestui que trust* to the amount or value disclosed.

This being a question of fact it must stand for hearing, and the demurrer to the bill, upon the points argued, must be overruled.¹

¹ On the point that the payment of debts gives no preference, see *In re Hallett & Co.*, [1894] 2 Q. B. 237; *City Bank v. Blackmore*, 75 Fed. 771; *American Can Co. v. Williams*, 178 Fed. 420; *Bettendorf Metal Wheel Co. v. Mast*, 187 Fed. 590; *Empire State Surety Co. v. Carroll County*, 194 Fed. 593; *In re Larkin & Metcalf*, 202 Fed. 572; *Drovers' Bank v. Roller*, 85 Md. 495; *City of St. Paul v. Seymour*, 71 Minn. 303; *Matter of Cavin*, 105 N. Y. 256; *Ferchen v. Arndt*, 26 Ore. 121; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237. But compare *State v. Bruce*, 17 Ida. 1; *Kansas State Bank v. First State Bank*, 62 Kan. 788.

M'MAHON v. FETHERSTONHAUGH.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. IRELAND. 1894.

[1895] 1 I. R. 83.

ADJOURNED SUMMONS on behalf of James F. Darcy, that he might be declared owner of so much of the Waterford and Limerick Railway of Ireland Stock, transferred by the Bank of Ireland to the credit of the matter as should be of the value of £433 5s., or that he might be admitted to claim against the assets of the deceased for that amount. The applicant, in an affidavit filed in support of the summons, stated that he had in September, 1892, employed the deceased, who had been a stockbroker, to sell £400 4½ per cent. preference stock of the Waterford and Limerick Railway, and that he afterwards received the deeds of transfer from the deceased, and executed them and returned them to him.

The deceased received from the brokers for the purchaser their cheque on the Bank of Ireland for £433 5s., the amount of the purchase-money of the said shares, which, deducting Mr. Reynold's commission, left £428 17s. payable to Mr. Darcy. This cheque was payable to "Reynolds or bearer," and was lodged on the day it was received, 7th September, 1892, to the credit of his current account with the Bank of Ireland. At the time of lodging the cheque the deceased had two accounts with the Bank, one his current account, on which he had a balance to his credit, the other a loan account, on which he was indebted to the Bank, but which was amply secured. On the 8th Sept. Mr. Reynolds died without having paid to Mr. Darcy the price of the stock sold for him. On the 16th September the Bank appropriated the entire credit balance of deceased, amounting to £818 9s. 4d., towards payment of the amount due to them on the loan account, and discharged the balance due, by sale of some of the securities. The remainder of the securities, consisting of forty-nine shares of the nominal value of £50, representing £2450 Waterford and Limerick Railway Stock was transferred by the Bank, to the credit of the matter. The defendant was the administratrix of the deceased.

THE VICE-CHANCELLOR [CHATTERTON]. The principles of equity applicable to this case are clear and well established. It appears that Mr. Darcy employed the deceased in this

matter to sell certain shares for him, which he accordingly sold, and was paid by the broker for the purchaser. Mr. Reynolds lodged the cheque which he received in payment, together with a small sum of money, to his current account on 7th September. He had at the same time a loan account, on which there was a considerable balance due to the Bank. Mr. Reynolds died on the following day, and the case is not complicated by any drawings against that lodgment. As the tree fell so it lay. There was £818 due to Reynolds by the Bank on his current account, while on his other account, which was a fully secured loan account, there was a balance due to the Bank.

There is as clear proof of identity as could possibly be required, and Mr. Darcy's money is traced into the £818. There is no question as to that. What was the consequence of Reynolds lodging this money in the way he did? The very moment it was lodged it became liable to the Bank's lien. The Bank had a clear right to appropriate this £818 to the debt due to them on the loan account, but the equity which Mr. Darcy had of marshalling against the securities held by the Bank was not thereby disturbed. The Bank have paid themselves out of Mr. Darcy's money, and *pro tanto* released the securities which have been lodged in Court, and the equity which Mr. Darcy had to marshal against those securities could not be disturbed by the action of the Bank in lodging the securities in Court. The rights of the parties are the same as if the securities were still in the hands of the Bank, and I hold that Mr. Darcy is entitled to stand in the place of the Bank as to these remaining securities, and accordingly I must declare that he has a lien on the fund brought in by the Bank of Ireland to the credit of this action for the sum of £428 17s., portion of £818.

The defendant must have her costs in the action, and Mr. Darcy is entitled to his costs with his demand.¹

¹ *In re Ennis*, 187 Fed. 720; *In re A. O. Brown & Co.*, 189 Fed. 432; *Red Bud Realty Co. v. South*, 96 Ark. 281; *Title Guarantee & Trust Co. v. Haven*, 196 N. Y. 487; *Buist v. Williams*, 88 S. C. 252; *Oury v. Saunders*, 77 Tex. 278, *accord*.

On the subject of following misappropriated or trust property, see 2 *Harvard Law Review* 28; 19 *Ibid.* 511; 27 *Ibid.* 125.

CHAPTER V.

THE NATURE OF THE REMEDIES OF THE *CESTUI QUE TRUST* AGAINST THE TRUSTEE.

MEGOD'S CASE.

QUEEN'S BENCH. 1585.

4 Leon. 225.

A. enfeoffed B. to the intent that B. should convey the said land to such person as A. should sell it. A. sold it to C., to whom B. refused to convey the land; and thereupon he brought an action upon the case against B. And by WRAY, Chief Justice and GAWDY, Justice here is a good consideration, for here is a trust, and that which is a good consideration in the Chancery is in this case sufficient. SHUTE, Justice was of a contrary opinion, and afterwards judgment was given for the plaintiff.¹

HOLLAND *v.* HOLLAND.

CHANCERY. 1869.

L. R. 4 Ch. 449.

THE question on this appeal was whether money due from the estate of a trustee in consequence of a breach of trust by him was a specialty debt.

¹ See *Butler v. Butler*, 2 Sid. 21; *Jevon v. Bush*, 1 Vern. 342, *ante*, p. 241; *Smith v. Jameson*, 5 T. R. 601, 603; *Bennett v. Preston*, 11 Ind. 291. But see *Ford v. Hoskins*, 1 Rolle 125; *Turner v. Sterling*, Freem. K. B. 15; *Barnardiston v. Soame*, 6 How. St. Tri. 1063; *Sturt v. Mellish*, 2 Atk. 610; *Holland v. Holland*, L. R. 4 Ch. 448, 451.

An action of special *assumpsit*, as well as an action of account, was allowed against a factor or bailiff who had expressly promised to render an account; but such actions were rare because of the competing jurisdiction of equity. See Ames, 240n.

Formerly, when there was no chancery jurisdiction in Massachusetts and Pennsylvania, a *cestui que trust* was allowed to sue the trustee in special *assumpsit* and recover damages for breach of trust. *Newhall v. Wheeler*, 7 Mass. 189, 198; *Martzell v. Stauffer*, 3 Pa. 398. See Fisher, Administration of Equity through Common Law Forms, 2 Sel. Essays in Anglo-Amer. Leg. Hist., 810; Pomeroy, Eq. Juris., secs. 286, 311-321, 338-342.

Henry Clarke, who died in December, 1856, devised his real estate to Joseph Clayton and Bartholomew Clayton, upon trust for his wife for life, and after her death upon certain other trusts. And the testator declared that if either of the trustees died or became unwilling to act, then it should be lawful for the surviving or continuing trustee, to nominate any fit person or persons to supply the place or places of such trustees or trustee.

By an indorsed indenture, dated the 10th of December, 1859, after reciting the death of the co-trustee, and that B. Clayton had proposed to appoint Frederick Cooke, and that Frederick Cooke had consented and agreed to become such trustee, as he did thereby testify and declare, it was witnessed that Clayton did thereby nominate and appoint Frederick Cooke to be trustee in the room of the deceased trustee, "and the said Frederick Cooke doth hereby testify and declare his acceptance of the trusteeship."

Bartholomew Clayton died in 1866, after which F. Cooke appeared to have possessed himself of the trust estate under the will, and to have misapplied it. He died in 1867, and a creditors' suit was instituted for the administration of his estate. New trustees had been appointed under the will of H. Clarke, and they carried in a claim against the estate of F. Cooke for £4,695 principal and £320 interest. The claim was not disputed, and the only question raised was whether it was a specialty debt or a simple contract debt. The Vice-Chancellor Stuart, on a motion to vary the certificate of his chief clerk, held the debt to be a specialty debt, and made an order accordingly.¹

The parties to the administration suit now moved by way of appeal that the order of the Vice-Chancellor might be discharged.

SIR C. J. SELWYN, L. J. The first question which arises in this case is, whether the deed of the 10th of December, 1859, by which the testator, whose estate is being administered in this suit, was appointed trustee, is to be construed as containing nothing more than an appointment of the testator to a certain trusteeship, and an acceptance by him of that trusteeship, or is to be construed as containing a covenant, or words equivalent to a covenant, on his part, to do some special act, or to perform some duty. It has been argued that, as the acceptance of the trust is twice referred to in the deed, it must be construed as if

¹ The statement of the case has been abridged, and the concurring opinion of Giffard, L. J., is omitted.

something more than a mere acceptance of the trust was intended, or must be implied; and if that acceptance had been twice referred to in the recital, or twice in the operative part of the deed, there would have been considerable force in that argument. But in this recital one thing is referred to as a thing proposed to be done, and then, according to the usual form adopted by conveyancers, the same thing is witnessed to have been done by the operative part of the deed. I think that both the recital and the operative part have one and the same object and effect, namely, the appointment to the trusteeship on the one hand, and the acceptance of it on the other, but that here is no express covenant to do any special act, or to perform any duty, and I think that no such covenant can be implied. The cases of *Courtney v. Taylor*, 7 Scott N. R. 749, 6 Man. & G. 51, and *Marryat v. Marryat*, 28 Beav. 224, are authorities in support of this conclusion.

Assuming, then, this to be the true construction of the deed, the next and the only remaining question is, whether, in consequence of the acceptance of the trusteeship by an instrument under seal, the present debt, and, as the argument has been properly and necessarily put, every other debt which could be proved against this estate in respect of this trusteeship, ought to be considered as a specialty debt. In my judgment this question is concluded by authority. The case of *Adey v. Arnold*, 2 D. M. & G. 432, was decided by Lord St. Leonards in 1852, when sitting in the Court of Appeal, and it therefore possesses, as I need not say, very great weight. In that case the deed was executed by the trustee, which, in my judgment, clearly amounted to an acceptance under seal by him of the trust; and that decision, so far as I know, has never since been questioned. Even in the present case the learned Vice-Chancellor has not in any degree impugned the authority of *Adey v. Arnold*, for his Honor appears to have been misinformed upon a matter of fact, and to have supposed that in the case of *Adey v. Arnold* the deed was not executed by the trustee; and but for that misapprehension I think it probable that his Honor's decision would have been different. On the other hand, the decision in *Adey v. Arnold* has been followed by Vice-Chancellor Kindersley in the case of *Wynch v. Grant*, 2 Drew. 312, by the Lord Chancellor of Ireland in *Newport v. Bryan*, 5 Ir. Ch. Rep. 119, and by Lord Cairns in the case of *Isaacson v. Harwood*, L. R. 3 Ch. 225. I think that the case of *Wood v. Hardisty*, 2 Coll.

542, cannot be considered as an interruption to the line of authorities, nor as in any degree questioning the authority of *Adey v. Arnold*, 2 D. M. & G. 432, for in that case there was an express declaration that, "subject to the trust aforesaid, the said William Forbes, his executors, administrators, and assigns, shall stand possessed of the said policies of assurance, and of the moneys, bonuses, and accumulations to be received in respect thereof, and of all other the premises hereby assigned, or intended so to be, upon trust for the said Susan, her executors, administrators, and assigns," and in any case, as a previous decision by a Vice-Chancellor, it must be treated as subordinate in point of authority to the subsequent decision of the Lord Chancellor sitting in the Court of Appeal. We may, therefore, take it that since the decision of *Adey v. Arnold* there has been a stream of authorities flowing in the same direction, never in any way interrupted or questioned.

I think, both upon principle and upon authority, the mere fact of a trustee being a party to and executing a deed by which he is appointed trustee and accepts the office, is not of itself sufficient to justify the Court in holding that a debt of such a character as that now before us is a specialty debt.

The order of the learned Vice-Chancellor should, therefore, be discharged.¹

SHARINGTON *v.* STROTTON, Plowd. 298.² — *Bromley*, counsel for the defendant, *arguendo*, said (p. 308): "Then as to the second point, admitting the considerations to be insufficient, or

¹ *Bartlett v. Hodgson*, 1 T. R. 42; *Adey v. Arnold*, 2 D. M. & G. 432; *Richardson v. Jenkins*, 1 Drew. 477 (*semble*); *Wynch v. Grant*, 2 Drew. 312; *Isaacson v. Harwood*, 3 Ch. 225; *Newport v. Bryan*, 5 Ir. Ch. 119; *Friahmuth v. Farmers' L. & T. Co.*, 107 Fed. 169; *Green v. Brooks*, 25 Ark. 318 (*semble*); *Benbury v. Benbury*, 2 Dev. & B. Eq. 235 (*semble*), *accord*.

In the following cases the court, finding evidence of an actual agreement to perform the trusts, adjudged the trustee to be a specialty debtor. *Gifford v. Manley*, Cas. t. Talbot, 108; *Mavor v. Davenport*, 2 Sim. 227; *Turner v. Wardle*, 7 Sim. 80; *Cummins v. Cummins*, 3 J. & Lat. 64; *Wood v. Hardisty*, 2 Coll. 542; *Lockhart v. Reilly*, 1 DeG. & J. 464.

Although the action of account was the normal remedy in the case of what may be called common law trusts as distinguished from purely equitable trusts, an action of covenant could also be brought against a bailiff or factor who by deed agreed to render a true account. *Hawkins v. Parker*, 2 Bulst. 256, 1 Rolle R. 52; *Barker v. Thorold*, 1 Saund. 47; *Wilkins v. Wilkins*, Comb. 149; *Spurraway v. Rogers*, 12 Mod. 517. — AMES.

² See *ante*, p. 140.

admitting that no considerations had been expressed, yet the covenant of itself, without consideration, is sufficient to raise the uses. And in order to understand this the better, let us see what advantage the party here shall have by the deed, if the deed be not sufficient to raise the uses. And it seems clearly that he shall have none. For he cannot have an action of covenant upon the deed, because there is nothing executory here; for Andrew has covenanted with Edward that he and all persons seized of the land shall from thenceforth stand and be seized to the uses limited. And if they did not stand seized, there is no default in Andrew, but in the law, for he granted that from thenceforth, viz. immediately, he would be seized, and no default can be charged in him if he did not stand seized. Nor can Edward have an action of covenant against him, for an action of covenant shall never be brought, but where it is covenanted that a thing shall be done in time to come, or that it was done in time past; as in the case put in 21 H. 7. where the covenant was that the land shall revert, remain, or descend; or if a man covenants to build a house, or to give a horse or to make such an assurance, or the like, which may be executed and performed afterwards; or where I have done such a thing. But there is no such matter here, for he covenanted and granted presently to stand seized to use, upon which no action of covenant lies. For if I covenant and grant with you, that my white horse shall from henceforth be your horse, you shall not have an action of covenant against me, although I detain the horse, for I have not covenanted to do any thing in time to come, nor that any thing was done in time passed; but the phrase of speech amounts to the effect to vest a present property in you. So here, when he covenanted from thenceforth to be seized to the uses limited, the phrase contains in effect a present actual seizin to use, and if the law be that the uses shall be presently made by it, then is he seized to the uses, and if the law be not so, and will not suffer it, then he is not seized to the uses, and there is no default in him; and from thence it follows, that the covenant and grant and the deed shall be void and of no effect. But here Andrew made the deed, and sealed and delivered it, and it was according to the intent of both the parties, and Andrew could never plead *non est factum*, and then if it be his deed, to make it of no value would be a hard exposition, and inconsistent with the existence of the deed. For a deed is not a deed but to some end and effect, and to say that it is a deed and

of no effect, is a contrariety. And if the uses should not be raised, no other advantage, benefit, or effect, could be made of it here. So that we see no action of covenant shall be maintainable upon the deed, nor any other advantage made of it, if it does not raise the uses."¹

CLARK'S CASE.

COMMON PLEAS. 1612.

Godbolt 210.

NOTE it was said by COOK, C. J., and agreed by the whole Court, and 41 and 43 E. 3. &c., that if a man deliver money unto I. S. to my use, that I may have an action of Debt, or Account against him for the same, at my election.² . . .

¹ "Nor has any case been found in which the feoffor obtained relief against the feoffee to uses on the latter's covenant to perform the use. Such a covenant, it is true, is mentioned in one or two charters of feoffment, but such instances are so rare that the remedy by covenant may fairly be said to have counted for nothing in the development of the doctrine of uses." Ames, Lect. Leg. Hist., 236. See *ibid.*, 148, 241; 2 Pol. & Mait., Hist. Eng. Law, 2 ed., 232; Pollock, Contracts, 8 ed., 219; Maitland, Equity, 115; 17 Col. L. Rev. 269, 270.

Conversely, if the transaction is in the nature of a promise rather than of a transfer, covenant will lie, but no use is raised. *Wingfield v. Littleton*, 2 Dyer 162. See *Sanders, Uses*, 96. But words of covenant may be construed as a grant when so intended by the parties. *Holms v. Seller*, 3 Lev. 305; *Rowbotham v. Wilson*, 8 H. L. Cas. 348; *Barnes v. Alexander*, 232 U. S. 117; *Bronson v. Coffin*, 108 Mass. 175, 180; *Hogan v. Barry*, 143 Mass. 538.

² See Ames, 4n. Formerly debt did not lie in such a case, account being the only available action. Y. B. 6 Hen. VI. fol. 7, pl. 33; Ames, 1.

"The action of account is very analogous to a trust. There is a marked analogy between a receipt of money by B. to the use of C., a bailment of goods to B. for the use of C., and a feoffment of land to B. for the use of C. In the case of goods the title passed, and C. had a legal remedy; in the case of land there was no remedy except in equity; in the case of money the only remedy was account. But the care required is the same in all three cases, — the liability apart from procedure was the same." Ames, Lect. Leg. Hist., 119.

"A trustee is obviously under an obligation to account with his *cestui que trust* for the trust property or its income; but this obligation is merely equitable, and therefore a bill by a *cestui que trust* against his trustee is never a bill for an account in point of jurisdiction." Langdell, Brief Survey, 97. See *Cearnes v. Irving*, 31 Vt. 604.

LINCOLN v. PARR.

KING'S BENCH. 1671.

2 Keble 781.

THE court declared their opinion that no evidence of account will maintain *Indebitatus*, as on money delivered to a factor, who often have discharges of greater value, and so involve the court, which they will not allow. *Ex motione* Winnington to alter *visn*, and it was said so to be ruled in Guildhall last sitting.

FARRINGTON v. LEE.

COMMON PLEAS. 1677.

1 Mod. 268.

THE COURT.¹ Whereas it has been said by Serjeant Newdigate, that the plaintiff here has an election to bring an action of account, or an *indebitatus assumpsit*, that is false; for till the account be stated betwixt them, an action of account lies, and not an action upon the case. When the account is once stated, then an action on the case lies, and not an action of account. And by NORTH, C. J. If upon an *indebitatus assumpsit* matters are offered in evidence that lie in account, I do not allow them to be given in evidence.

DALE v. SOLLET.

KING'S BENCH. 1767.

4 Burr. 2133.

THIS was an action for money had and received to the plaintiff's use: *non assumpsit* was pleaded; and issue joined.

CASE. — The defendant, a ship-broker, was the plaintiff's agent in suing for and recovering a sum of money for damages done to the plaintiff's ship; and did recover and receive 2,000*l.* for the plaintiff's use; and paid him all but 40*l.* which he retained for his labour and service therein; which the witness (Mr. Fuller) swore he thought to be a reasonable allowance. And the jury were of opinion "that the defendant ought to retain

¹ A part of the case is omitted.

40*l.* as a reasonable allowance." Consequently, the plaintiff was not intitled to recover.

The plaintiff objected, at the trial, "that the defendant could not give evidence in this manner, of this labour and service; but ought to have pleaded it by way of sett-off, or at least have given notice of it as a sett-off."

A verdict was found for the plaintiff; subject to the opinion of this Court: and if the Court should be of opinion against him, then judgment to be entered as upon a nonsuit.

Accordingly, on Tuesday last, (the 10th instant,) *Mr. Dunning* moved on behalf of the defendant, "that judgment might be entered against the plaintiff, as upon a nonsuit:" and had a rule to shew cause.

Sir Fletcher Norton, on behalf of the plaintiff, now shewed cause; and insisted that the defendant ought either to have pleaded it, or given notice of a sett-off: but that he could not take advantage of it in this manner, without either plea or notice.

LORD MANSFIELD had no doubt of the defendant's being at liberty to give this evidence.

This is an action for money had and received to the plaintiff's use. The plaintiff can recover no more than he is in conscience and equity entitled to: which can be no more than what remains after deducting all just allowances which the defendant has a right to retain out of the very sum demanded. This is not in the nature of a cross-demand or mutual debt: it is a charge, which makes the sum of money received for the plaintiff's use so much less.

The two other Judges concurred.

PER CUR'. *Judgment for the defendant, as on a nonsuit.*¹

¹ Lord Mansfield's innovation, sanctioning the use of *Indebitatus assumpsit* against a defendant, who is entitled to allowances in the way of commissions and expenses, has been almost everywhere followed. It is impossible for the plaintiff in such a case to prove his allegation that the defendant is indebted to him, as has been pointed out by Professor Langdell in 2 *Harvard Law Review*, 253-257; but the great convenience of this common count, as compared with the action of account, or a bill in equity, the legitimate substitute therefor, has led the courts to shut their eyes to this objection. Accordingly *Indebitatus assumpsit* has been allowed against a factor, agent for collection, pledgee or mortgagee for surplus proceeds of a sale, trustee of insurance policy for proceeds of policy, and guardian. — AMES.

As to the scope of the action of account and on the question how far debt and *indebitatus assumpsit* have become concurrent with account, see Ames, 1-8; Ames, *Lect. Leg. Hist.*, 116-121; Langdell, *Brief Survey*, 85-89; 2 *Harv. L. Rev.* 253-257.

ALLEN, ASSIGNEE OF PRIOR, A BANKRUPT, v.
IMPETT AND ANOTHER.

COMMON PLEAS. 1818.

8 Taunt. 263.

ASSUMPSIT for money had and received. At the trial, before Dallas, J., at the London sittings after the last term, it appeared that the defendants were trustees of the marriage settlement of the bankrupt, and that certain stock thereby settled was held by them, upon trust, to pay the dividends to the bankrupt during his life; that he had been permitted by the defendants to receive these dividends until the issuing of the commission against him, which happened in December, 1815; that in August, 1816, the defendants executed a power of attorney to a third party to receive the dividends, who accordingly received two half-years' dividends, due in April and October, 1816, and paid them over to the wife of the bankrupt, and also received another half-year's dividend, due in April, 1817, which he paid over to one of the defendants. The present action was brought to recover the total amount of these dividends. Dallas, J., being of opinion that the defendants were liable in equity only, and that the action was not maintainable, directed a nonsuit.

PER CURIAM. This action is brought to recover the amount of dividends of stock to which the bankrupt was entitled, and which his trustees have received since the bankruptcy, and applied to various purposes. With full notice of the bankruptcy, they refuse to pay the money over to the assignees. There cannot be any difficulty in sustaining this action, the whole of the money having been virtually received by the trustees.

*Rule absolute.*¹

¹ In the following cases it was held that an action at law lay: *Hart v. Minors*, 2 Cr. & M. 700 (account stated); *Roper v. Holland*, 3 A. & E. 99 (account stated); *Topham v. Morecraft*, 8 E. & B. 972 (account stated); *Howard v. Brownhill*, 23 L. J. Q. B. 23 (account stated); *Daugherty v. Daugherty*, 116 Iowa 245 (wrongful sale); *Nelson v. Howard*, 5 Md. 327 (account stated); *Henchey v. Henchey*, 167 Mass. 77 (misappropriation of money by trustee); *Clifford Banking Co. v. Donovan Com. Co.*, 195 Mo. 262 (donee of trust money); *Hanford v. Duchastel*, 87 N. J. L. 205 (transferee of trust money with notice); *Boughton v. Flint*, 74 N. Y. 476 (account stated); *Van Camp v. Searle*, 147 N. Y. 150 (account stated); *Spencer v. Clarke*, 25 R. I. 163

BARTLETT *v.* DIMOND, EXECUTRIX.

EXCHEQUER. 1845.

14 M. & W. 49.

POLLOCK, C. B.¹ This case was argued last term, and time taken for consideration. The question is, whether an action will lie against the defendant as executor, for money had and received by his testator. The testator was appointed by deed by the plaintiff, a mortgagor, and Palmer, the mortgagee, to receive the rents of the mortgaged estate, and by the terms of the deed the testator was, after allowing for the taxes and repairs to the tenants, to hold all the remaining rents in trust for the purposes in the deed specified. The purposes are — first, to pay taxes; secondly, the costs of collection; thirdly, a commission; fourthly, premiums on a policy of assurance; and lastly, to apply the surplus in or towards satisfaction, on the 6th January and 6th July, of the accruing interest on the principal money secured, and to pay the ultimate surplus, if any, to the plaintiff, with a proviso, that if on those days, the 6th January and 6th July, the testator should have rents and profits in hand, it should be lawful for him to retain the whole or part, for the purpose of paying the premiums in that year on the policy; with other provisos. The deed contained a

(account stated). See Ames, 37n.; Langdell, Brief Survey, 86; 2 Harv. L. Rev. 254.

In the following cases it was held that the remedy at law was exclusive: Taylor *v.* Turner, 87 Ill. 296 (factor); Tenn. etc. Co. *v.* Fitzgerald, 140 Ill. App. 430 (factor); Crooker *v.* Rogers, 58 Me. 339 (mortgagee); Frue *v.* Loring, 120 Mass. 507 (trustee); Township *v.* Crane, 80 N. J. Eq. 509 (tax collector); Van Seiver *v.* Churchill, 215 Pa. 53 (trustee); Franks *v.* Craven, 6 W. Va. 185 (transferee of trust property).

In the following cases it was held that the remedy at law was not exclusive: Clews *v.* Jamieson, 182 U. S. 461; Smith *v.* Amer. Nat. Bk., 89 Fed. 832; Dorenkamp *v.* Dorenkamp, 109 Ill. App. 536; Bullock *v.* Angleman, 82 N. J. Eq. 23.

"This court will not allow itself to be ousted of any part of its original jurisdiction, because a court of law happens to have fallen in love with the same or a similar jurisdiction, and has attempted (the attempt for the most part is not very successful) to administer such relief as originally was to be had here and here only." Eyre *v.* Everett, 2 Russ. 381, 382, *per* Lord Eldon. See Pomeroy, Eq. Juris., secs. 182, 276-278.

¹ The statement of facts is omitted.

covenant by the testator with Palmer and with the plaintiff, that the testator, as long as he should be receiver, would use his endeavors to collect and receive, and would pay and cause to be paid, in manner and for the ends, intents, and purposes aforesaid, all the rents received by him. The testator did not execute the deed. According to the terms of this indenture, the defendant was bound, as Mr. Martin argued, to pay whatever was the balance on each 6th January and 6th July, first, in satisfying the interest, and, secondly, to pay over the then surplus to the plaintiff; and as the account stated by the executor showed a balance on some of those days, an action would have lain, not of covenant, because the defendant did not execute the deed, but of special assumpsit (because he agreed to the instrument), on the special contract to make the payments; and, as nothing more was to be done but to pay money, an action for money had and received could be maintained.

Whether, if this had been the true construction of the deed, such an action would have been supported, is not now the question, because we are all clearly of opinion that the testator was not bound, by the terms of the deed, to pay the surplus existing on each 6th January and 6th July to the plaintiff. Although there is a contract by the testator to receive and pay the moneys according to the deed, yet it is nothing more in effect than a contract to perform the trusts specified by the indenture, and all the moneys received by him under the indenture were held in trust. The testator was not a mere receiver, but a trustee, and the primary important object of his trust was to keep down the mortgage interest; and for that purpose he had a discretion, under the control of a court of equity, to keep the funds in his hands, if reasonably necessary, and was not bound, on each 6th January and 6th July, to balance his accounts, and pay over on those days the then surplus. For instance, it might happen that, on the 6th July, the trustee might know that no rents would be forthcoming in time to pay the half-year's interest due in January; and, if so, he might, without contravening the deed, keep the then surplus towards the subsequent interest. Whether he did so properly or not could not be tried by a court of law: the only remedy would be in a court of equity, which could make proper inquiries and give proper directions. So long as a trust continues, a bill in equity is the only remedy. We think that the moneys received were originally received in trust, and that the trust had not

determined at the testator's death. If that trust was ended, and the testator had stated an account, or, in other words, had admitted himself to the plaintiff that he held any sum of money in his hands payable to him absolutely, he would, with respect to that sum, be a debtor, not properly a trustee, and then an action would have been maintainable against him. This is the principle upon which *Roper v. Holland*, 3 Ad. & Ell. 99, 4 Nev. & M. 668, and other cases (see *Remon v. Hayward* 2 Ad. & Ell. 666) referred to in the judgment of this court in the case of *Pardoe v. Price*, 13 M. & W. 282, was decided. The case of *Allen v. Impett*, 8 Taunt. 263, seems at least questionable.

There is no evidence, however, of any such statement of account. If the account rendered by the executor had been rendered by the testator, it would have been a question for the jury whether it was such a statement as to constitute the testator a debtor; but being stated by the executor as the account of the testator, it is only equivalent to evidence that such payments as therein mentioned were made by and to the testator. We therefore think the rule must be discharged.

*Rule discharged.*¹

ANONYMOUS.

COMMON PLEAS. 1464.

Y. B. 4 Edw. IV. f. 8, pl. 9.

IN a writ of trespass *quare vi et armis clausum suum fregit, &c., et arbores succidit, &c., et herbas conculcavit et consumpsit, &c.*

Catesby. You should have no action, for we say that a long time before the supposed trespass one J. B. was seised of certain land, &c., the place where, &c., in fee; and being so seised

¹ See *Ames*, 39n. See also *Case v. Roberts*, Holt N. P. 500; *Herrick v. Snow*, 94 Me. 310; *Davis v. Coburn*, 128 Mass. 377; *Upham v. Draper*, 157 Mass. 292; *Taft v. Stow*, 174 Mass. 171; *Nester v. Ross*, 98 Mich. 200; *Zeide-man v. Molasky*, 118 Mo. App. 106; *Kendall v. Kendall*, 60 N. H. 527; *Van Camp v. Searle*, 147 N. Y. 150, 161; *Husted v. Thomson*, 158 N. Y. 328; *Jasper v. Hazen*, 1 N. D. 75; *Cearnes v. Irving*, 31 Vt. 604 (account); *Goupille v. Chaput*, 43 Wash. 702.

If a trustee of land wrongfully gives it away, he is not liable for money had and received. *Norton v. Ray*, 139 Mass. 230.

A trustee who negligently injures the trust property is not liable in an action on the case. *Hukill v. Page*, 6 Biss. (U. S.) 183. See *Bishop v. Houghton*, 1 E. D. Sm. (N. Y.) 566.

enfeoffed the plaintiff thereof in fee, &c., to the use of the defendant, &c., upon confidence, and afterwards the defendant by the sufferance and will of the plaintiff occupied this land and cut trees upon the same, &c., and trampled the grass, which is the same trespass, &c.

Jenney. This is no plea, for there is no certain matter, for such sufferance and will cannot be tried, &c.; and in such case to make a good issue or traversable matter, he should plead a lease by the plaintiff to the defendant to hold at will, which is traversable and may be tried.

Catesby. Why shall he not plead this matter when it follows reason that the defendant enfeoffed the plaintiff to the defendant's use, and so the plaintiff is in reason in this land only to the defendant's use, and the defendant made the feoffment upon trust and confidence, and the plaintiff suffered the defendant to occupy the land, so that in reason the defendant occupied at his will,¹ which proves that the defendant shall therefore have the advantage of pleading the feoffment in trust to justify the occupation, &c.

MOYLE, J. This would be a good matter in the chancery, for the defendant there shall plead the intent and purpose upon such feoffment, for by conscience one shall have remedy in the chancery, according to the intent of such a feoffment; but here by the common law in the Common Bench or King's Bench it is different, for the feoffee shall have the land, and the feoffor shall not justify against his own feoffment, whether the feoffment was upon confidence or not.

Catesby. The law of chancery is the common law of the land, and if there the defendant shall have advantage of such a feoffment, why not likewise here?

MOYLE, J. That cannot be in this court as I have told you, for the common law of the land varies in this case from the law of chancery on this point, &c.

¹ A *cestui que trust* in possession of the land by the permission of the trustee was treated as a tenant at will under Stat. 3 & 4 Wm. IV. c. 27, § 2. *Garrard v. Tuck*, 8 C. B. 231, 251-254 (explaining *Doe v. Phillips*, 10 Q. B. 130). Compare *Melling v. Leak*, 16 C. B. 652. — AMES.

WEAKLY, ON THE DEMISE OF YEA, BART., v.
ROGERS.

EXCHEQUER CHAMBER. 1789.

5 East 138, note.

SIR WILLIAM YEA had agreed, about seven years before, with the defendant to grant him, in consideration of a certain sum which was paid, a lease for his own and his son's life; and the defendant, on the faith of that agreement, had entered into possession and built a house on the premises. After which Sir William (not having executed any lease) gave the defendant six months' notice to quit, considering him as tenant from year to year, and brought this ejectment. The case was argued in this court in Trinity Term, 29 Geo. III.; when the court, after taking time to consider, and (as it was understood) not being agreed in opinion, directed the case to be argued before all the judges in the Exchequer Chamber; which argument took place in Michaelmas Term, 30 Geo. III., when a second argument was awarded, but the case was never brought before the judges again. [*Vide* 7 Term Rep. 51.] But, as I collected at the time, Lord LOUGHBOROUGH, C. J., GOULD, ASHHURST, and BULLER, JJ., were of opinion that the defendant's equitable title might be set up as a defence to the ejectment. Lord KENYON, C. J., EYRE, C. B., and HEATH, J., were decidedly of a different opinion: and with these it is probable that the other judges coincided; though I have no authority for saying so; and no public opinion was ultimately delivered on the case. But that an equitable title cannot be set up in ejectment has ever since been considered as settled.¹

BACON, READING ON THE STATUTE OF USES, 7. — But these books are not to be taken generally or grossly; for we see in the

¹ See cases cited Ames, 242n. Conversely the *cestui que trust* cannot recover in ejectment against the trustee. *White v. Costigan*, 138 Cal. 564.

To-day in most jurisdictions the *cestui que trust* may defeat an action of ejectment brought by the trustee by a statutory equitable plea; in a few jurisdictions such a plea has been allowed without the aid of a statute. *Cushing v. Danforth*, 76 Me. 114; Ames, 242, 243.

A trustee of a chattel may recover it from the *cestui que trust*, or damages for its conversion, in an action at law, except in jurisdictions allowing equit-

same books, when an use is specially alledged, the law taketh knowledge of it; but the sense of it is, that an use is nothing for which remedy is given by the course of the common law, so as the law knoweth it, but protects it not; and therefore when the question cometh, whether it hath any being in nature or conscience, the law accepteth of it; and therefore Littleton's case is good law; that he who hath but forty shillings freehold in use, shall be sworn in an inquest,¹ for it is ruled *secundum dominium naturale*, and not *secundum dominium legitimum*, *nam natura dominus est, quia fructum ex re percipit*. And some doubt if upon subsidies and taxes *cestuy que use* should be valued as an owner: so likewise if *cestuy que use* had released his use unto the feoffee for six pounds, or contracted with a stranger for the like sum, there is no doubt but it is a good condition or contract whereon to ground an action upon the case; for money for release of a suit in chancery is a good *quid pro quo*; therefore to conclude, though an use be nothing in law to yield remedy by course of law, yet it is somewhat in reputation of law and conscience.

Co. Litt. 272b. — *Nota*, an use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collaterall, annexed in privitie to the estate of the land, and to the person touching the land, *scilicet*, that *cestuy que use* shall take the profit, and that the terre-tenant shall make an estate according to his direction. So as *cestuy que use* had neither *jus in re*, nor *jus ad rem*, but only a confidence and trust, for which he had no remedie by the common law, but for breach of trust, his remedie was only by *subpoena in chancerie*.

THE EARL OF KILDARE v. EUSTACE.

CHANCERY. 1686.

1 Vern. 405, 419.

THE plaintiff's bill was to be relieved touching the trust of certain lands in Ireland. The defendants had appeared and answered the bill, and had not any way objected to the jurisable pleas. *Langille v. Nass*, 36 D. L. R. (Nova Scotia) 368; Ames, 342. And conversely, the *cestui que trust* of a chattel cannot recover it at law from the trustee. *Redwood v. Riddick*, 4 Munf. (Va.) 222 (detinue).

¹ Co. Litt. 272a, b. See Y. B. 15 Hen VII. fol. 13, pl. 1.

diction of this court: but the cause coming now to be heard, the Lord Chancellor objected, this court could not hold pleas of land in Ireland.

For the plaintiff it was urged, that he was proper for relief in this court by reason that both plaintiff and defendant were here in England, and that a court of equity does only *agere in personam*; its proceedings are to reform the conscience of the party, and if at any time a court of equity may be said to *agere in rem*, it is only in the case of sequestration, which is for the contempt of the party; and that therefore the defendant being served with a subpoena here, and living in England, this court had proper jurisdiction of the cause, though the land lies in Ireland; and the rather, for that it was never yet pretended that there was any local action in equity: and they instanced for precedents the late cases of the Lord Arglasse and Muschamp, 1 Vern. 75, and Lord Arglasse and Pit, and Archer's Case, (see *Barker v. Dormer*, 1 Show. 192), and insisted that otherwise there would be a failure of justice, for the defendant living here could not be served with process issuing out of the Chancery in Ireland.

But the LORD CHANCELLOR [JEFFREYS] overruled the plaintiff's counsel, and said as to the cases of the Lord Arglasse, the fraudulent contracts were made here in England; and as to the present case there would be no failure of justice, for they might have a subpoena out of this court returnable in the Chancery of Ireland; as in his own experience in cases between master and 'prentice in the city of London, he had known subpoenas to have issued out of this court returnable in the Mayor's court in London for persons that lived out of the jurisdiction; and therefore pronounced the rule for the dismissing the bill: but at the importunity of the plaintiff's counsel gave them a week's time to search for precedents.

The Lord Chancellor and the Judges having been attended with precedents, Sir John Holt argued for the plaintiff, as to the preliminary point only (to wit) whether this court had jurisdiction, and might hold plea of the lands in question which lay in Ireland. . . .

The defendant's counsel in a manner waived the preliminary point, and would not enter into the debate whether this court might not decree the trust of lands in Ireland, the trustee living here; but that it was certainly a matter discretionary in the court, whether they would do it or not; and that as this case

was circumstanced, they apprehended the court would not interpose. . . .

After long debate, the judges [BEDINGFIELD, C. J., and ATKINS, C. B.] concurring with his Lordship, that the court had a proper jurisdiction in this case, and that the judges in England were proper expositors of the Irish laws, and that by the true construction of this statute the trust was vested in the king, and not the land itself, and the proof being full as to the identity of the person, decreed for the plaintiff, as to one moiety; the trust as to the other moiety being for Sir Morrice Eustace himself, and not for Fitzgerald.¹

METHODS OF PROTECTING EQUITABLE RIGHTS. 1. A defendant who fails to obey a decree of a court of equity is punishable for contempt. 2 Daniell, Ch. Pl. & Pr., 6 Am. ed., *1042 *et seq.*

2. By a writ of assistance or by its modern substitute, a writ of possession, a court of equity may put the complainant in possession of the property in dispute. 2 Daniell, *1062. This gives the complainant some relief and may operate indirectly to compel the defendant to convey. Huston, Decrees in Equity, 80. See *Schenck v. Conover*, 2 Beas. (N. J.) 220.

3. By a writ of sequestration the court may take possession of property of the defendant as a means of compulsion. "This court hath from time to time enlarged its power to make its decrees effectual; it was held all along until King James's time, that the decrees of this court bound only the person, and could not meddle with sequestering of land; neither did the court of exchequer ever do it till of late; but finding their decrees would be useless in many cases where the person was obstinate, it is now the common practice of both courts." *Lower v. Weale*, Freem. C. C. 107, 109 (1689). Personal property may even be sold and the proceeds used to satisfy the complainant's claim.

¹ "The Courts of Equity in England are, and always have been, courts of conscience, operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction." *Per* Lord Selborne, in *Ewing v. Ewing*, 9 App. Cas. 34, 40, 10 App. Cas. 453, s.c. See also *Black Point Syndicate v. Eastern Concessions*, 79 L. T. 658; *Re Clinton*, 88 L. T. 17; *Gilliland v. Inabnit*, 92 Iowa 46. See also cases cited Ames, 245n.

For reasons of convenience or of policy, relief as to property outside the jurisdiction may be refused. Ames, Cas. Eq. Juris., 22n.; 20 Harv. L. Rev. 392; 17 Col. L. Rev. 497.

See *Hide v. Pettit*, 1 Chan. Cas. 91, Freem. C. C. 125; *Daniell*, *1047 *et seq.* A receiver may be appointed to take possession and manage the trust property. *Perry, Trusts*, secs. 818-820.

4. By the Judgments Act, 1838 (1 & 2 Vict. c. 110) secs. 18, 19, it was provided that a decree in equity whereby a sum of money shall be payable, shall have the same effect as a judgment at law. 2 *Daniell*, *1031. There are similar statutes in this country. *Huston*, 83.

5. Finally there are statutes allowing the court, either directly by its decree or by a conveyance by an officer of the court, to vest title in the complainant or in a new trustee. *Felch v. Hooper*, 119 Mass. 52; *Ames*, 249n. See Chap. III, sec. II, *ante*. The statutes in some states apply to personalty as well as to land. For a discussion of the nature of such a proceeding, see *Amparo Mining Co. v. Fidelity T. Co.*, 74 N. J. Eq. 197, 75 N. J. Eq. 555. See also *Cook, The Powers of Courts of Equity*, 15 Col. L. Rev. 37, 106, 228; *Huston*, chap. V.

If the *res*, as well as the trustee, is beyond the jurisdiction, no relief can be given. *Ames* 249n.

Although the trustee is subject to the jurisdiction of the court, a decree cannot operate in *rem* when the *res* is outside the jurisdiction. *Fall v. Eastin*, 215 U. S. 1, *aff'g Fall v. Fall*, 75 Neb. 104; *Sharp v. Sharp* (Okla., 1917), 166 Pac. 175.

On the question what law governs the creation of trusts, see *Beale, Equitable Interests in Foreign Property*, 20 Harv. L. Rev. 382.

ETTLINGER v. THE PERSIAN RUG & CARPET CO.

COURT OF APPEALS, NEW YORK. 1894.

142 N. Y. 189.

APPEAL from order of the General Term of the Supreme Court in the first judicial department, made November 18, 1892, which reversed a judgment in favor of defendant Theodore Schumacher, entered upon an order dismissing the complaint on trial at Special Term and ordered a new trial.

This action was brought by plaintiff as holder of a bond of defendant, the Persian Rug and Carpet Company, secured by a mortgage executed by said company to the defendant Paul M. Krause, as trustee, to foreclose said mortgage.

The facts, so far as material, are stated in the opinion.

FINCH, J. The determination of a single question discussed on the argument will dispose of this appeal. The plaintiff was one of two bondholders protected by a trust mortgage. His complaint showed all the facts necessary to a judgment of foreclosure if the action had been brought by the trustee, and sought to justify his intervention as bondholder and plaintiff in the action upon the ground that the trustee had left this country, and was somewhere in foreign parts, and had become insane. On the trial the fact of such absence was shown; that the family of the trustee had also departed to join him abroad; and that inquiries made in natural and reasonable directions were answered by the statement that the trustee had become insane. The Special Term dismissed the complaint upon the ground that the bondholder could not sue where there was a competent trustee unless the latter refused to act, and where the trustee had become incompetent it was necessary first to procure the appointment of a new trustee. The dismissal of the complaint did not go upon any failure of proof, but assuming the allegations of the complaint to have been established, still held that the plaintiff could not sue for a foreclosure. An appeal was taken to the General Term, which reversed the judgment and ordered a new trial. Instead of going back and presenting his defense so far as he had one, the defendant, who was the remaining bondholder, and for whose interest a foreclosure was as much of a necessity as for that of the plaintiff, adopted the perilous experiment of an appeal to this court, with the required stipulation for judgment absolute. It appeared on the argument that the defendant was injured only at a single point: not by the foreclosure; not by its natural and proper result; not even by the appointment of a temporary receiver; but by a sale of the property claimed to have been collusive, and which vested title in the plaintiff for less than the real value. All that could have been remedied on a new trial. A re-sale could have been ordered, or the plaintiff compelled to account for the property at its just and fair value, which would have given to the defendant everything to which he was entitled. Seeing the situation and observing the defendant's danger, we suggested to his counsel on the argument the prudence of escaping it by a withdrawal of his appeal. He declined the suggestion, and if any hardship results it will not be the fault of the court.

We are satisfied that the plaintiff had the right to maintain the action, and that fact alone justified the reversal of the

judgment by the General Term. It is conceded that the beneficiary may sue where the trustee refuses, but that is because there is no other remedy, and the right of the bondholder, otherwise, will go unredressed. The doctrine does not rest rigidly upon a technical ground, but upon a substantial necessity. In the case of a corporation a stockholder may sue, not only because it refuses, but because those who represent it are the very parties who have committed the wrong. *Brinckerhoff v. Bostwick*, 88 N. Y. 52. In that case we said that a demand upon the corporation to sue would be "futile" and so was "unnecessary," and since the action could not be "effectually prosecuted in that form" the shareholders might sue. What occurred in the present case was tantamount to and an equivalent of a refusal by the trustee. He had gone beyond the jurisdiction; the whole apprehended mischief would be consummated before he could be reached; and if reached there was sufficient reason to believe that he was incompetent. But the Special Term say that in such event a new trustee should have been appointed. That simply reproduces the same difficulty in another form, for a court would hardly remove a trustee without notice to him and giving him an opportunity to be heard. And why should a new appointment be made when any one of the bondholders can equally do the duty of pursuing the foreclosure? The court, in such an action, takes hold of the trust, dictates and controls its performance, distributes the assets as it deems just, and it is not vitally important which of the two possible plaintiffs sets the court in motion. The bondholders are the real parties in interest; it is their right which is to be redressed, and their loss which is to be prevented; and any emergency which makes a demand upon the trustee futile or impossible, and leaves the right of the bondholder without other reasonable means of redress should justify his appearance as plaintiff in a court of equity for the purpose of a foreclosure.

It is unnecessary to consider or discuss other questions, which were numerous. What we have said requires us to affirm the order of the General Term and award judgment absolute against the defendant upon his stipulation, with costs.

All concur.

Ordered accordingly.

CHAPTER VI.

THE TRANSFER OF THE INTEREST OF THE *CESTUI QUE TRUST*.

BACON, READING ON THE STATUTE OF USES, 16. — For the transferring of uses, there is no case in law whereby an action is transferred, but the *subpoena* in case of use was always assignable.¹

¹ See Doctor & Student, Dialogue II, c. 22 (1523) *ante*, p. 138; Y. B. 27 Hen. VIII. fol. 8, pl. 22, *ante*, p. 138; Hopkins v. Hopkins, West t. Hardw. 606, 621; Gilbert, Uses, 50. By Stat. 1 Rich. III. c. 1 the *cestui que use* was enabled to pass a legal title.

It was formerly held that in the case of an active trust the *cestui que trust* could not assign his interest. Anon., 6 Jenk. Cent. 244, pl. 30 (1576); Earl of Worcester v. Finch, 4 Inst. 85 (1600). But see *contra*, Warmstrey v. Tanfield, 1 Ch. Rep. 29 (1628).

In New York it was provided in the Revised Statutes, 1830 (part 2, chap. 1, tit. 2, sec. 63) that "No person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable." Similar provisions have been adopted in several states. See Burns' Ind. Stat., 1914, sec. 4015 (unless trust instrument provides otherwise); Kan. Gen. Stat., 1915, sec. 11677 (like Ind.); Mich. Comp. L., 1915, sec. 11583; Minn. G. S., 1913, sec. 6718; Mont. Rev. Codes, 1907, sec. 4547; Wis. Stat., 1915, sec. 2089. In New York the beneficiary may now transfer his interest except in the case of a trust "to receive rents and profits of real property and apply them to the use of any person." (Real Prop. L., sec. 103.)

On the question how far the creator of a trust may restrain an assignment by the beneficiary of his interest, see Brandon v. Robinson, 18 Ves. 429, and Broadway Nat. Bk. v. Adams, 133 Mass. 170, *post*, pp. 601, 604.

On the assignability of a right to sue for breach of trust, see Hill v. Boyle, L. R. 4 Eq. 260; *Re Park Gate etc. Co.*, 17 Ch. D. 234.

In Brown v. Fletcher, 235 U. S. 589, a trustee and *cestui que trust* were both citizens of the state of New York; the *cestui que trust* assigned his beneficial interest to a citizen of Pennsylvania, who brought suit against the trustee for the enforcement of the trust in the federal district court for the Southern District of New York. A federal statute (Jud. Code, 1911, sec. 24) provides that no district court shall have cognizance of any suit to recover upon any *chose* in action in favor of any assignee, unless such suit might have been prosecuted in such court if no assignment had been made. The Supreme Court held that the district court had jurisdiction. See 17 Col. L. Rev. 273.

ANONYMOUS.

———. 1465.

Y. B. 5 Edw. IV. fol. 7, pl. 16.

IF tenant in borough-English enfeoffed one to the use of him and his heirs, the youngest son shall have the subpœna and not the heir general;¹ likewise if a man makes a feoffment in trust of land descended to him on the maternal side and dies without issue, the heir *ex parte materna* shall have the subpœna.²

REX v. WILLIAMS.

CHANCERY. 1735.

Bunb. 342.

Two joint purchasers of a lease for years assign this lease to a third person (a friend of one of the jointenants, and with the

¹ Y. B. 21 Ed. IV. fol. 24, pl. 10; Y. B. 27 Hen. VIII. fol. 9, pl. 22; *Jones v. Reasbie*, 2 Roll. Abr. 780, pl. 7; *Fawcett v. Lowther*, 2 Ves. Sen. 300, 304 (*semble*); *Banks v. Sutton*, 2 P. Wms. 700, 713 (*semble*), *accord*. — AMES.

² *Burgess v. Wheate*, 1 Eden 177, 186, 216, 256; *Langley v. Sneyd*, 1 S. & S. 45, 55; *Nanson v. Barnes*, L. R. 7 Eq. 250, *accord*.

"If by a custom of a manor land in fee ought to descend to the eldest daughter only, excluding the other daughters, there being no son, and a trust in equity descends to the heir, this shall go to the eldest daughter only, to be relieved upon this in equity according to the custom for the land. P. 10 Car." 2 Roll. Ab. 780 [D] 7.

In *Banks v. Sutton*, 2 P. Wms. 700, Sir J. Jekyll, M. R., said, p. 713: "That trusts and legal estates are to be governed by the same rules, is a maxim that obtains universally; it is so in the rules of descent, as in gavelkind and borough-English lands, there is a *possessio fratris* of a trust as well as of a legal estate; the like rules in limitations, and also of barring entails of trusts, as of legal estates." See to the same effect *Freedman's Co. v. Earle*, 110 U. S. 710, 713. — AMES.

"A. seised in fee of land in burrough-English makes a feoffment to the use of himself and the heirs males of his body, according to the course of the common law; these words, according to the course of the common law, are void; for customs which go with the land, as this is, and gavelkind, and such-like customs which fix and order the descents of inheritances, can be altered only by Parliament." Anon., 5 Jenk. Cent. Cas., 220, pl. 70.

"It is the maxim of this court that trust estates, which are the creatures of equity, shall be governed by the same rules as legal estates, in order to preserve the uniform rule of property; and that the owner of the trust shall have the same power over the trust as he would have if he had the legal estate for the like interest or extent." *Hopkins v. Hopkins* (1739), West t. Hardw. 606, 618, *per* Lord Hardwicke.

consent of the other) but it was without consideration, and no declaration of trust was given, and so the defendant confessed in his answer; the jointenant who consented to assign died in debt.

Upon the bill and answer the question was, whether this trust shall result for the benefit of the jointenant surviving only as it would at law; or whether the creditors of the jointenant that died should come in for an equal moiety in equity.

Nota, The trustee was made executor to him that died, and was also a creditor of his.

Nota, The two jointenants continued to receive the profits jointly after the assignment.

Upon this state of the case the whole Court were of opinion that though survivorship is looked upon as odious in equity, yet that in this case the trust shall survive for the benefit of the surviving *cestui que trust* only.¹

KING v. THE EXECUTORS OF SIR JOHN DACCOMBE.

EXCHEQUER. 1618.

Cro. Jac. 512.

KING JAMES made a lease to Sir John Dacombe and others, of the provision of wines for his Majesty's house for ten years, in trust for the Earl of Somerset. They made a lease for all the term except one month, rendering nine hundred pounds a year. The Earl of Somerset being afterwards attainted of felony, the question was, whether the trust which was for the said earl was forfeited to the king by this attainder. And it was referred to all the justices of England, by command from the king, to be considered of, and to certify their opinions.

TANFIELD, Chief Baron, now delivered all their opinions to be, that this trust was forfeited to the king, and that the executor shall be compelled in equity to assign the residue of the term and the rent to the king. And he cited a case to be adjudged, 24 Eliz., where one Birket had taken bond in another's name, and was afterwards outlawed, that the king should have this bond; and that in 24 Eliz., one Armstrong, being lessee for years,

¹ *Aston v. Smallman*, 2 Vern. 556; *York v. Stone*, 1 Salk. 158, *accord*. See Pomeroy, Eq. Juris., sec 408.

In *Re Mitchell*, [1892] 2 Ch. 87, the interest of a *cestui que trust pur auter vie* passed to a special occupant.

assigned the lease to another in trust for himself, and being attainted of felony, this trust was forfeited to the king. But he said they all held, and so it was resolved in another case, [Abington's Case, Hard. 490 (cited)] that a trust in a freehold was not forfeited upon attainder of treason. *Note*, This case I had from the report of Humphrey Davenport, who was of counsel in this case.¹

ANONYMOUS.

———. 1465.

Y. B. 5 Edw. IV. fol. 7, pl. 18.

If there are lord and tenant, and the tenant enfeoffs one without declaring his will and commits a felony, and is attainted, *quære*, who shall have the subpœna, for the lord shall not have it.²

CARPENTER *v.* CARPENTER.

WASBORNE *v.* DOWNES.

CHANCERY. 1686.

1 Vern. 440.

In these cases it was resolved, that where a common recovery is suffered, or a fine levied by *cestui que trust* in tail, it shall have

¹ See Ames, 353n., 366n.; Taylor *v.* Haygarth, 14 Sim. 8; Talbot *v.* Jevers, [1917] 2 Ch. 363.

² See the leading case of Burgess *v.* Wheate, 1 W. Bl. 123, 1 Eden 177, in which the court held, Mansfield, C. J., dissenting, that if the *cestui que trust* of land dies without heirs, the trustee may keep the land. See also Taylor *v.* Haygarth, 14 Sim. 8; King's Att'y *v.* Sands, Freem. C. C. 129; Ames, 364n.; Ames, Lect. Leg. Hist., 197; Hardman, The Law of Escheat, 4 L. Quar. Rev. 318, 330-336. And see Chap. IV, sec. I, *ante*. By the Intestates Estates Act, 1884 (47 & 48 Vict. c. 71), sec. 4, it was provided that the law of escheat should apply to equitable interests in land.

In dealing with uses and trusts the Chancellor usually did not follow rules founded upon feudal principles. Thus, it was held that such incidents as relief, wardship (Y. B. 27 Hen. VIII. fol. 8, pl. 22), primer seisin (Jenk. C. C. 190), fine on alienation, as well as escheat, were not applicable to equitable interests. Similarly, rules which derived their force from the technical conception of seisin were held inapplicable to equitable interests. Thus, although at law there could be no overlapping of estates or hiatus between estates, yet shifting and springing uses were allowable. So also although a freehold estate in land could not be devised at common law, yet uses were devisable. Maitland, Equity, 26-29; 17 Col. L. Rev. 269, 271-273.

the same effect, and avail as much in this court, and bind the trust in the same manner as the same would the estate in law in case he had the legal estate in him; and as to a fine, it had never been doubted since the case in the Lord Bridgman's time.¹ And it has been held by some, that even a bargain and sale enrolled by *cestui que trust* of an estate tail should bind the issue, in regard that such a trust is not within the statute *de donis*.² . . .

BOTTOMLEY v. LORD FAIRFAX.

CHANCERY. 1712.

Prec. Ch. 336.

IN this case it was clearly agreed that if a husband before marriage conveys his estate to trustees and their heirs, in such manner as to put the legal estate out of him, tho' the trust be limited to him and his heirs, that of this trust estate the wife, after his death, shall not be endowed, and that this court hath never yet gone so far as to allow her dower in such case.

WATTS v. BALL.

CHANCERY. 1708.

1 P. Wms. 108.

THE case in effect was: One seised of lands in fee had two daughters, and devised his lands to trustees in fee, in trust

¹ Goodrick v. Brown, Freem. C. C. 179, 1 Ch. Ca. 49, 1 Eq. Ca. Abr. 255; Washbourn v. Downes, 1 Ch. Ca. 213; Hopkins v. Hopkins, West t. Hardw. 606, 621 (*semble*); Brydges v. Brydges, 3 Ves. Jr. 120, 127; *Re White*, 7 Ch. D. 201, *accord*.

² "Feoffment to the use of one in tail is within the statute *de donis conditionalibus*, as in case *Morgan v. Manxfield*, 19 H. 8, fo. 19." Crompton, Courts, 60. "At common law all inheritable estates were in fee-simple, and it was the statute *de donis* that first gave rise to entails and expectant remainders. As this statute was long prior to the introduction of uses, had equity followed the analogy of the common law only, a trust limited to A and the heirs of his body, and in default of issue to B, would have been construed a fee-simple conditional, and the remainder over would have been void; but the known legal estates of the day, whether parcel of the common law or ingrafted by statute, were copied without distinction into the system of trusts, and, equitable entails indisputably existing, the question in constant dispute was, by what process they were to be barred." Lewin, Trusts, 890. As to the methods of barring an equitable entail, equity followed as nearly as possible the analogy of the law. *Ibid.* 890-892. See Ames, 322n.

to pay his debts, and to convey the surplus to his daughters equally.

The younger daughter married and died, leaving an infant son and her husband surviving.

The eldest daughter brought a bill for a partition; and the only question was, whether the husband of the younger daughter should have an estate for life conveyed to him, as tenant by the curtesy?

The husband in his answer had sworn that he married the younger daughter upon a presumption that she was seised in fee of a legal estate in the moiety; that at the time of the marriage she was in the actual receipt of the profits of such moiety; and it was admitted that this trust was not discovered until after the death of the younger daughter, nor until it was agreed that a partition should be made.

Decreed by LORD CHANCELLOR [COWPER], that trust estates were to be governed by the same rules, and were within the same reason, as legal estates; and as the husband should have been tenant by the curtesy, had it been a legal estate, so should he be of this trust estate; and if there were not the same rules of property in all courts, all things would be, as it were, at sea, and under the greatest uncertainty.

His Lordship added, that this being a case of some difficulty, he could have wished it had not come before him as a cause by consent; but his opinion was, that the husband ought to be tenant by the curtesy, and the rather, because it appeared that he upon his marriage did conceive and presume his wife to be seised of a legal estate in the moiety, and had reason to think so, she being in possession thereof.

Wherefore it was decreed that an estate for life in a moiety in severalty should be conveyed by the trustees to the husband, with remainder in fee to his son.

In this cause, *Mr. How* (who was for the husband) cited the case of *Sweetapple v. Bindon*, 2 Vern. 536, where money was devised to be laid out, for the benefit of a *feme sole* in the purchase of lands in fee; the *feme* married, and had issue, and died, the husband surviving; and decreed in equity that though the money was not invested in a purchase during the life of the wife, yet in regard, in this case, if it had been so laid out the husband would have been tenant by the curtesy, and that this was as land in equity, therefore the husband was equally entitled. . . .

D'ARCY v. BLAKE.

CHANCERY, IRELAND. 1805.

2 Sch. & Lef. 387.

IN this case it had been referred to the Master to inquire and report whether the defendant Margaret Blake was entitled to dower out of all or any, and which of the estates of her late husband, if not bound by a certain deed in the plaintiff's bill mentioned. It appeared that the estates in question were let at the time of the marriage upon leases for lives, which continued during the coverture. The Master reported that the defendant was not entitled to dower, to which report the defendant excepted.

LORD CHANCELLOR [REDESDALE]. The general principle on which courts of equity have proceeded in cases of dower is, that dower is to be considered as a mere legal right; and that equity ought not to create the right where it does not subsist at law; that therefore there can be no dower of an equity of redemption reserved upon a mortgage in fee, though there may of an equity of redemption upon a mortgage for a term of years, because in that case the law gives dower subject to the term. A court of equity will assist a widow by putting a term out of her way, where third persons are not interested. But against a purchaser, a court of equity will not give that assistance, as in *Lady Radnor v. Vandebendy*, Prec. Ch. 65. The difficulty in which the courts of equity have been involved, with respect to dower, I apprehend, originally arose thus: They had assumed as a principle in acting upon trusts, to follow the law; and according to this principle, they ought, in all cases where rights attached on legal estates, to have attached the same rights upon trusts; and consequently to have given dower of an equitable estate. It was found, however, that in cases of dower this principle, if pursued to the utmost, would affect the titles to a large proportion of the estates in the country; for that parties had been acting on the footing of dower, upon a contrary principle, and had supposed that by the creation of a trust the right of dower would be prevented from attaching. Many persons had purchased under this idea; and the country would have been thrown into the utmost confusion if courts of equity had followed their general rule with respect to trusts in the cases of dower.

But the same objection did not apply to tenancy by the curtesy; for no person would purchase an estate subject to tenancy by the curtesy, without the concurrence of the person in whom that right was vested. This I take to be the true reason of the distinction between dower and tenancy by the curtesy. It was necessary for the security of purchasers, of mortgagees, and of other persons taking the legal estates, to depart from the general principle in case of dower; but it was not necessary in the case of tenancy by the curtesy. Pending the coverture, a woman could not alien without her husband; and therefore nothing she could do could be understood by a purchaser to affect his interest: but where the husband was seised or entitled in his own right, he had full power of disposing, except so far as dower might attach; and the general opinion having long been that dower was a mere legal right, and that as the existence of a trust estate previously created prevented the right of dower attaching at law, it would also prevent the property from all claim of dower in equity; and many titles depending on this opinion, it was found that it would be mischievous in this instance to the general principle that equity should follow the law; and it has been so long and so clearly settled that a woman should not have dower in equity who is not entitled at law, that it would be shaking everything to attempt to disturb the rule. In point of remedy, a woman claiming dower may be assisted in equity: a court of equity will put out of her way a term which prevents her obtaining possession at law; but that is only as against an heir or volunteer, not a purchaser, the heir or volunteer being considered as claiming in no better right than she does. When, therefore, any question of dower has arisen in courts of equity, and doubts have been entertained of the title to dower, the constant practice in England has been to put the widow to bring her writ of dower at law. The courts will assist her in trying her right, and enjoying the benefit of it, if determined at law in her favor, by giving her a discovery of deeds, by ascertaining metes and bounds; and they do not require her to execute the writ with all the formalities necessary at law; and the right being ascertained by judgment at law, will give her possession according to her right; but still they require that the question of her title to dower, if subject to doubt, should be determined at law. What was thrown out by Sir Joseph Jekyll in *Banks v. Sutton*, 2 P. Wms. 700, has been long overruled. See Cox's note (1), 2 P. Wms. 719. The rule of courts of equity, so far as it excludes a

widow from dower of an equitable estate against an heir or volunteer, goes perhaps beyond the reason of the rule. But I have called this subject to my recollection a good deal, by looking into the authorities since this case was first mentioned; and the decisions to the full extent are so old, so strong, and so numerous, so generally adopted in every book on the subject, and so considered as settled law, that it would be very wrong to attempt at this time to alter them. Nor do I think that the doubts which have been suggested with respect to an equitable estate can be fairly raised in this case, where the claim is of dower of estates leased for lives before the marriage, and continuing subject to such leases, at the death of the husband. Of those parts of his estate the late husband of the defendant Margaret Blake was not so seised as to entitle her to dower at law; and if equity were strictly to follow the law, she could have no claim in equity for dower of those estates. He had not such seisin as to entitle her to dower; and the exception must be therefore overruled.¹

¹ *Dower*. The wife of a *cestui que use* was not entitled to dower. Y. B. 13 H. VII. fol. 7, pl. 3; *Crumwel v. Andros*, 2 And. 69, 75 (*semble*); *Vernon's Case*, 4 Rep. 1b; *Doct. & Stud.*, Dial. II, c. 22; *Chaplin v. Chaplin*, 3 P. Wms. 229, 234; Preamble to Statute of Uses, *ante*, p. 2; *A. G. v. Scott*, Cas. t. Talb. 138; *Gilbert, Uses*, 48. And in the absence of a statute, the rule is the same in the case of the wife of a *cestui que trust*. See *Ames*, 375n.

Dower in equitable interests in land is now allowed by statute in England. *Dower Act*, 1833 (3 & 4 Will. IV. c. 105). But this statute allows a husband by conveyance *inter vivos* or by will to deprive his wife of dower both in legal and equitable estates.

In the United States by statute a wife is generally given dower in her husband's equitable estates in land. *Stimson*, Amer. Stat. Law, sec. 3212. In some of the states she has an interest in equitable estates only if the husband was beneficially entitled on his death. *Neb. R. S.*, 1913, sec. 1265; *Ohio Gen. Code*, 1910, sec. 8606; *Tenn. Code*, 1896, sec. 4139. In others she has an interest if he was beneficially entitled at any time during coverture. *Ill. R. S.*, 1917, c. 41, sec. 1; *Kan. Gen. Stat.*, 1915, sec. 3831; *Mo. R. S.*, 1909, sec. 345; *N. J. Comp. Stat.*, 1910, p. 2043; *R. I. Gen. Laws*, 1909, p. 1195; *Utah Comp. Laws*, 1907, sec. 2826. But in a few states the old rule still prevails. *Cornog v. Cornog*, 3 Del. Ch. 407; *Bush v. Bush*, 5 Del. Ch. 144; *Lobdell v. Hayes*, 4 Allen (Mass.) 187; *Seaman v. Harmon*, 192 Mass. 5, 7; *Hopkinson v. Dumas*, 42 N. H. 296.

In England before the *Dower Act*, 1833, the widow of a mortgagor had no right to dower. *Dawson v. Bank*, 6 Ch. D. 218. In the United States however the weight of authority, even in jurisdictions where the mortgagor has no legal estate, is the other way. *Cornog v. Cornog*, 3 Del. Ch. 407; 2 *Jones, Mortgages*, 7 ed., sec. 666; 12 *Ann. Cas.* 481; *Ann. Cas.* 1913B 1310.

Curtsey. The husband of a *cestui que use* was not entitled to curtesy.

WITHAM'S CASE.

CHANCERY. 1590.

Fourth Ins. 87.

WITHAM'S CASE in the chancery was, that a term for years was granted to the use of a *feme sole*, she took husband and died; whether the husband should have the use, or the administrators of the *feme*, was referred to the judges; and by them it is resolved, that the administrators should have it, and not the husband, because that this trust of a *feme* was a thing in privity, and in nature of an action, for which no remedy was but by writ of *subpoena*. And so it was resolved by the justices in Waterhouse's Case, Hil. 8 [38?] Eliz. [Cro. EL 466, Poph. 106.] *Eborum*, for the trust runneth in privity in this case, and a husband should not be tenant by the curtesie of an use, nor the lord of the villain should have it at common law.¹

WIFE'S SEPARATE ESTATE IN EQUITY. By a most remarkable piece of judicial legislation the courts of equity have held that one who gives a woman an equitable interest may prevent her husband from acquiring rights in that interest corresponding to the legal rights which a husband has at common law in Bro. Abr. Feoff. al Uses, pl. 40; Chudleigh's Case, 1 Rep. 122a; Gilbert, Uses, 49; Lewin, Trusts, 3. But even in the absence of a statute the rule is otherwise in the case of the husband of a *cestui que trust*. See Ames, 380n. Similarly the husband of a mortgagor is entitled to curtesy. *Cashburne v. Inglis*, 2 Jac. & W. 194.

By statute in England to-day a married woman may, by disposing of her property by deed or by will, bar her husband's claim to curtesy even in the case of legal estates. Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).

¹ Co. Litt. 351a; Anon., Jenk. 6 Cent. 245 pl. 30, Dy. 369a, s. c.; Denie's Case, Lane 113, cited; Hunt v. Baker, Freem. Ch. 62, *accord*.

But in *Rex v. Holland* (1647), Aleyn 15, Witham's case being cited, "Rolle, J., said that it hath been since resolved that the husband shall have it in that case." See in agreement with the opinion of Rolle, J., *Re Bellamy*, 25 Ch. D. 620; *Archer v. Lavender*, Ir. R. 9 Eq. 220; 1 Preston, Abst., 343; Lewin, Trusts, [12 ed., 959]. — AMES.

For a brief summary of the effect of marriage at common law upon a wife's legal interests in property, either in freeholds, chattels real, chattels personal or *choses* in action, see Dicey, Law and Opinion, 2 ed., 372n.

As to what constitutes reduction to possession by the husband of the wife's equitable interest in a *chose* in action, see *Elwin v. Williams*, 13 Sim. 309; Ames, 388n., 389n.

property legally owned by his wife. The legal title might be given to a third person or to the husband as trustee or even to the woman herself, in which last case her husband became trustee for her. In order fully to protect her, a provision restraining alienation by her was also upheld. These holdings revolutionized the position of women, at least women of the well-to-do class. See Dicey, *Law and Opinion*, 2 ed., 371-395. See also Gray, *Restraints*, secs. 125 *et seq.*

If an equitable fee simple is given to a woman for her separate use and she dies without having alienated her interest, her husband is entitled to curtesy. *Appleton v. Rowley*, L. R. 8 Eq. 139; Ames, 383n. On the question whether the creator of the separate use may by express provision exclude the husband from curtesy, see Ames, 383n.

On the question whether a separate use arises in the event of a subsequent marriage, see *Robbins v. Smith*, 72 Oh. St. 1; Ames, 389-391; Gray, *Restraints*, sec. 274.

The whole subject is today largely regulated by statute. It is generally dealt with in the course on Persons.

BARTHROP *v.* WEST.

CHANCERY. 1671.

2 Ch. Rep. 62.

THE PLAINTIFF'S suit is to have the benefit and equity of redemption of leases mortgaged, and other trust estates, made liable for the payment of his debt, being on judgment for 2000*l.*, and to have a voluntary deed of trust set aside, as against the plaintiff.

This court decreed the plaintiff to have the equity of redemption to be liable, and as assets to satisfy his said debt of 2000*l.*, and set aside the said voluntary deed of trust, and all trust estate and surplus thereof after preceding debts paid, to be assets in equity for the payment of the plaintiff.

FOLY'S CASE.

CHANCERY. 1679.

Freem. C. C. 49.

THE executors of Foly preferred a bill against all the creditors, some being by judgment, some by bond, and some by simple

contract; the testator having devised lands to the executors for the payment of his debts; and he had in the first place in his will devised an annuity of 50*l. per ann.* to be paid to his wife.

LORD CHANCELLOR [NOTTINGHAM] directed, first, that the lands being devised to his executors, it shall be construed that the testator intended they should be paid in the same order as the law directs; that is to say, that the debts should be first paid before this annuity, which was but a legacy, let the wording of the will be how it will; although it devised the lands charged with this annuity for the payment of debts, yet the debts should have the preference; but he held that the debts of all kinds, whether by judgments, bonds, or simple contract, should be satisfied *pari passu*, and if the value of the land fell short, then that they should be satisfied in proportion, only judgments that did affect the land without any such devise were to have the preference; but a debt by a decree in Chancery should be but in equal degree with debts by bond or contract, because that doth not bind the land until sequestration.

But so far as the personal estate did extend, he ordered that the debts should be paid in that order as the law did direct, and there a debt by a decree in Chancery should have the preference of a bond.

EQUITABLE ASSETS. If a debtor dies leaving equitable interests in property, these interests are liable for the payment of his debts to the same extent as the corresponding legal interests. Creditors who are entitled to priority out of the legal interests are also entitled to priority out of such equitable interests. It was at one time thought that all equitable interests should be applied to the payment of the testator's debts *pro rata*. See *Gray v. Colvile*, 2 Ch. Rep. 143, 1 Vern. 172; *Creditors of Cox*, 3 P. Wms. 341; Ames, 435n, 438n. But the principle that equity follows the law finally triumphed in the courts and was recognized by the Statute of Frauds, sec. 10.

Quite different however is the principle governing "equitable assets" properly so called. "Ordinarily and strictly, the term, *equitable assets*, applies only to property and funds belonging to the estate of a decedent, which by law are not subject to payment of debts, in the course of administration by the personal representatives, but which the testator has voluntarily charged with the payment of debts generally, or which, being non-existent at law, have been created in equity, under circum-

stances which fasten upon them such a trust." Freedman's *Co. v. Earle*, 110 U. S. 710, 717. Such assets are applied *pro rata* to the payment of the decedent's debts. See Maitland, *Equity*, 199-201, quoted Warren, *Cas. Wills*, 666; Ames, 438n.

The doctrine of equitable assets is of slight consequence in this country because, in the first place, the testator's lands as well as personalty can be reached by his creditors; and, secondly, priorities among different classes of creditors are largely abolished. See 4 Gray, *Cas. Prop.*, 2 ed., 558.

STATUTE OF FRAUDS.

29 Chas. II. c. 3 (1676).

X. AND be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June [1677] it shall and may be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance hereafter to be made or had, to do, make, and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents, and hereditaments as any other person or persons be in any manner of wise seised or possessed, or hereafter shall be seised or possessed, in trust for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution hereafter shall be so sued, had been seised of such lands, tenements, rectories, tithes, rents, or other hereditaments of such estate as they be seised of in trust for him at the time of the said execution sued;¹ (2) which lands, tenements, rectories, tithes, rents, and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued; (3) and if any *cestui que trust* hereafter shall die, leaving a trust in fee-simple to descend to his heir, there and in every such case such trust shall be deemed and taken, and is hereby declared to

¹ By the Judgments Act, 1838 (1 & 2 Vict. c. 110), sec. 11, the remedy was extended so as to include trusts existing at the time of entering up the judgment or at any time afterwards.

be assets by descent, and the heir shall be liable to and chargeable with the obligation of his ancestors for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended, any law, custom, or usage to the contrary in any wise notwithstanding.¹

KIRKBY v. DILLON.

CHANCERY. 1824.

Coop. 504.

SIR JOHN LEACH. Formerly it was very common for debtors to convert their legal estates into equitable estates for the purpose of defeating such of their creditors as might obtain judgments. That practice gave rise to numerous bills in this court for what is called an equitable execution. In many cases of that kind the legislature has now given to creditors full relief in the courts of common law by the Statute of Frauds, which directs the sheriff to deliver execution of all lands, which any person is seised or possessed of, in trust for him against whom the execution is sued. Yet, however liberal the construction which the courts of common law may be disposed to put upon this enactment, it is obvious there must be cases in which a debtor has a beneficial interest in land, and yet no one can be said in a legal sense — in such sense as a court of common law must understand the statute — to be seised or possessed in trust for him. At all events, there must be cases in which no process of a common-law court can get at that estate, of which some one is seised or possessed in trust for the debtor. In such cases as these, presenting impediments, which the common-law courts cannot remove, bills for equitable execution must continue to be filed.²

¹ This section of the Statute of Frauds applies only to bare trusts. See cases cited Ames, 437n. And it does not extend to trusts of chattels real. *Scott v. Scholey*, 8 East 467; Ames 443n.; *Lewin, Trusts*, 1035.

² See Ames, 439n. As a rule, the creditor must exhaust his remedy at law before resorting to a bill for equitable execution. *Trotter v. Lisman*, 199 N. Y. 497; 23 L. R. A. (N. S.) 1. In Massachusetts the rule is otherwise. *Barry v. Abbot*, 100 Mass. 396; *Wilson v. Martin-Wilson etc. Co.*, 151 Mass. 515, 517.

One judgment creditor may by diligence obtain priority over others. As to what is necessary to obtain priority, see *Freedman's Co. v. Earle*, 110

DUNDAS v. DUTENS.

CHANCERY. 1790.

2 B. & B. 233 (cited).¹

IN the case of *Dundas v. Dutens*, the question was, whether stock that had been settled could be brought within the reach of creditors. I have a note of that case, which on this point is more full than the printed report of it, which I will briefly state. LORD THURLOW says: "Is there any case where stock standing in a trustee's name can be made available to pay debts, or that debts (and stock is a *chose in action*) shall be transferred to creditors for that purpose? You cannot have an execution at law against such effects. The opinion in *Horn v. Horn*, Amb. 79, is so anomalous and unfounded, that forty such opinions would not satisfy me. It would be preposterous and absurd to

U. S. 710; *Kinmonth v. White*, 61 N. J. Eq. 358; *Glenn*, Creditors' Rights and Remedies, sec. 16.

As a rule in the absence of statute an equitable interest cannot be levied upon at law nor garnished. *Gray*, Restraints, secs. 171-173. In some states however statutes have gone much further than the Statute of Frauds in subjecting equitable interests to a common-law execution. *Kan. Gen. Stat.*, 1915, secs. 7426, 7438 (see *Poole v. French*, 71 Kan. 391); *Tenn. Code*, 1896, secs. 5260, 6092. And see *Kennedy v. Nunan*, 52 Cal. 331; *Johnson v. Conn. Bk.*, 21 Conn. 148, 159; *Crosby v. Elkade Lodge*, 16 Iowa 399; *Baumann v. Ballantine*, 76 N. J. L. 91; *Laird v. Cotton*, 196 N. Y. 169; *Brearley School v. Ward*, 201 N. Y. 358.

On the question how far a judgment creates a lien on equitable interests of the judgment debtor, see 2 *Freeman*, Judgments, 4 ed., sec. 348; 1 *Black*, Judgments, 2 ed., sec. 433; *Williams*, Real Prop., 22 ed., 296.

By statute in a few jurisdictions, *e.g.*, California (*Civ. Code*, sec. 859), Illinois (*R. S.* 1917, ch. 22, sec. 49), Michigan (*Comp. L.* 1915, sec. 11577), Minnesota (*G. S.* 1913, sec. 6712), Montana (*Rev. Codes*, 1907, sec. 4541), New Jersey (see *Baumann v. Ballantine*, 76 N. J. L. 91), New York (*Real Prop. L.*, sec. 98; *Code Civ. Pro.*, sec. 1391; see 9 *Bench and Bar*, 6, 59, 106), North Dakota (*Comp. L.* 1913, sec. 5369), Oklahoma (*R. L.* 1910, sec. 6664), South Dakota (*Civ. Code*, sec. 307), Tennessee (*Code* 1896, sec. 6092), and Wisconsin (*Stat.* 1915, sec. 2083), the creditors of the *cestui que trust* are either excluded altogether or allowed to reach only a part of the income, for example only the surplus income that may remain after providing for a suitable support of the *cestui que trust*. See *Gray*, Restraints, secs. 286-296; *Perry*, Trusts, sec. 386a.

On the question how far the creator of a trust may prevent creditors of the *cestui que trust* from reaching his interest, see *Brandon v. Robinson*, 18 Ves. 429, and *Broadway Nat. Bk. v. Adams*, 133 Mass. 170, *post*, pp. 601, 604.

¹ 1 Ves. Jr. 196, 2 Cox 240, s. c.

set aside an agreement, which, if set aside, leaves the stock in the name of a person where you could not touch it." ¹

¹ *Caillaud v. Estwick*, 2 Anst. 381; *Nantes v. Corrock*, 9 Ves. 182, 189 (*semble*); *Rider v. Kidder*, 10 Ves. 360; *Plasket v. Dillon*, 1 Hog. 324, *accord*.

Horn v. Horn, Amb. 79; *Taylor v. Jones*, 2 Atk. 600 (*semble*); *Hadden v. Spader*, 20 Johns. 554, 5 Johns. Ch. 280; *Storm v. Waddell*, 2 Sandf. Ch. 494 (but see *Donovan v. Finn*, 1 Hopk. 59; *Bramhall v. Ferris*, 14 N. Y. 41, 45; *Graff v. Bonnett*, 31 N. Y. 9, 26; *Campbell v. Foster*, 35 N. Y. 361, 365), *contra*.

The explanation of the principal case lies in the fact that by the English decisions the legal interest in a *chose in action*, owned by a debtor, could not [prior to 1838] be reached by his creditor, either at law or in equity. *Bank of England v. Lunn*, 15 Ves. 569 (*semble*); *Guy v. Peakes*, 18 Ves. 196 (*semble*); *Francis v. Wiggell*, 1 Mad. 258 (*semble*); *Grogan v. Cooke*, 2 B. & B. 230 (*semble*); *Cochrane v. Chambers*, Amb. 79n.; *Sims v. Thomas*, 12 A. & E. 536.

The English rule on this point was adopted by many American courts. *Shaw v. Aveline*, 5 Ind. 380; *Stewart v. English*, 6 Ind. 176; *Peoples v. Stanley*, 6 Ind. 410; *Williams v. Reynolds*, 7 Ind. 622; *Keightley v. Walls*, 27 Ind. 384; *Buford v. Buford*, 1 Bibb 305; *Winebrinner v. Weisiger*, 3 Mon. 32; *M'Ferran v. Jones*, 2 Litt. 219; *Cosby v. Ross*, 3 J. J. Marsh. 290; *Estill v. Rodes*, 1 B. Mon. 314; *Hardenburg v. Blair*, 30 N. J. Eq. 645, 663; *Greene v. Keene*, 14 R. I. 388; *Moxon v. Gray*, 14 R. I. 641; *Ewing v. Cantrell*, Meigs 364; *Erwin v. Oldham*, 6 Yerg. 185; *White Co. v. Atkeson*, 75 Tex. 330 (*semble*).

But in other states the debtor's interest in a *chose in action* is accessible to a creditor by a bill for equitable execution. *Watkins v. Dorsett*, 1 Bland 530; *Sargent v. Salmond*, 27 Me. 539; *Drake v. Rice*, 130 Mass. 410; *Wright v. Petrie*, Sm. & M. 282, 320; *Catchings v. Manlove*, 39 Miss. 655; *Tappan v. Evans*, 11 N. H. 311, 326; *Abbot v. Tenney*, 18 N. H. 109; *Chase v. Searles*, 45 N. H. 511; *Bayard v. Hoffman*, 4 Johns. Ch. 450; *Weed v. Pierce*, 9 Cow. 722; *Proseus v. McIntire*, 5 Barb. 424, 433-34; *McGill v. Harman*, 2 Jones Eq. 179; *Burton v. Farinholt*, 86 N. C. 260. (But see *Doak v. State Bank*, 6 Ired. 309, 335.)

If, however, legal property is exempt from execution at law on grounds of public policy, it is of course equally beyond the reach of equitable execution. *M'Carthy v. Goold*, 1 B. & B. 387 (officer's half-pay); *Mathews v. Feaver*, 1 Cox 278 (copyhold). — AMES.

By the Judgments Act, 1838 (1 & 2 Vict. c. 110), sec. 12, it is provided that money, bank notes, cheques, bills, notes, bonds, specialties, or other securities for money may be seized on a writ of *fiери facias*; and by sec. 14 of the same Act it is provided that government stock or stock in public companies standing in the name of a judgment debtor or in the name of any person in trust for him may be ordered charged with the payment of the judgment. The Common Law Procedure Act, 1854, provided for the attachment of debts. See Rules of the Supreme Court, Orders 45 and 46. See also Lewin, *Trusts*, c. XXVIII, sec. 7.

And in those states in which a debtor's *chose* in action formerly could not be reached, this defect has been removed by statute, and such interests can be reached either at law by garnishment or proceedings supplementary to execution, or by equitable execution. *Digney v. Blanchard*, 229 Mass. 235.

BRANDON v. ROBINSON.

CHANCERY. 1811.

18 Ves. 429.¹

THE bill stated that Stephen Goom, by his will, dated the 1st of August, 1808, devised and bequeathed to the defendants Robinson and Davies all his real and personal estates upon trust to sell, and to divide or otherwise apply the produce to the use of all and every his child or children, living at his decease, in equal proportions; deducting from the share of Thomas Goom the sum of 500*l.* which had been advanced to him, and from the share of William Goom what should be due from him to the testator at his decease, — the said sums so to be deducted to be divided equally among the other children; and he declared his will, that the said several legacies, shares, and eventual interests of such of the legatees as at the time of his decease should have attained the age of twenty-one should be considered as vested interests; and, if there should be but one survivor, upon trust to pay and transfer the same unto such only survivor, his or her executors, &c., for his or her own use, subject nevertheless to such directions as after mentioned in respect to the shares or interests of such of the said legatees as were females, and also in respect to the share and interest of the said Thomas Goom; and he directed that the eventual share and interest of his said son Thomas Goom, of and in his estate and effects, or the produce thereof, should be laid out in the public funds or in government securities at interest by and in the names of his said trustees, &c., during his life; and that the dividends, interest, and produce thereof, as the same became due and payable, should be paid by them from time to time into his own proper hands, or on his proper order and receipt, subscribed with his own proper hand, to the intent the same should not be grantable, transferable, or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or of any part thereof; and that upon his decease the principal of such share, together with the dividends and interest and produce thereof, should be paid and applied by his trustees or executors, their heirs, executors, &c., unto and amongst such person or persons as in a course of administration would become entitled to any personal

¹ 1 Rose 197, s. c.

estate of his said son Thomas Goom, and as if the same had been personal estate belonging to him, and he had died intestate.

The bill further stated, that after the death of the testator his son Thomas Goom, having attained the age of twenty-one, became a bankrupt. The plaintiff was the surviving assignee under the commission; and the bill prayed an execution of the trusts of the will and an account, that the estates may be sold, and the clear residue ascertained, and that the plaintiff may receive the benefit of such part or share thereof, or of the interest therein, as he shall be entitled to as assignee under the commission.

To this bill the defendants, the trustees, put in a general demurrer.

Mr. Leach and *Mr. Roupell*, for the plaintiff, gave up the claim to the principal. . . .

THE LORD CHANCELLOR [ELDON]. There is no doubt that property may be given to a man until he shall become bankrupt. It is equally clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life-estate; and, as I have observed, a disposition to a man until he shall become bankrupt, and after his bankruptcy over, is quite different from an attempt to give to him for his life, with a proviso that he shall not sell or alien it. If that condition is so expressed as to amount to a limitation, reducing the interest short of a life-estate, neither the man nor his assignees can have it beyond the period limited.

In the case of *Foley v. Burnell*, 1 Bro. C. C. 274, this question afforded much argument. A great variety of clauses and means was adopted by Lord Foley with the view of depriving the creditors of his sons of any resort to their property; but it was argued here, and, as I thought, admitted, that if the property was given to the sons, it must remain subject to the incidents of property, and it could not be preserved from the creditors, unless given to some one else.

So the old way of expressing a trust for a married woman was, that the trustees should pay into her proper hands, and upon her own receipt only; yet this court always said she might dispose of that interest, (*Pybus v. Smith*, 1 Ves. Jr. 189; 3 Bro. C. C. 340. See the notes, 1 Ves. Jr. 194; 5 Ves. 17), and her assignee would take it; as, if there was a contract, entitling the assignee, this court would compel her to give her own receipt, if that was necessary to enable him to receive it. It was not before Miss

Watson's Case that these words, "not to be paid by anticipation," &c., were introduced. I believe these were Lord Thurlow's own words, with whom I had much conversation upon it. He did not attempt to take away any power the law gave her, as incident to property, which, being a creature of equity, she could not have at law; but as under the words of the settlement it would have been hers absolutely, so that she could alien, Lord Thurlow endeavored to prevent that by imposing upon the trustees the necessity of paying to her from time to time, and not by anticipation; reasoning thus, that equity, making her the owner of it, and enabling her, as a married woman, to alien, might limit her power over it: but the case of a disposition to a man, who, if he has the property, has the power of aliening, is quite different.

This is a singular trust. If upon these words it can be established that he had no interest, until he tenders himself personally to the trustees to give a receipt, then it was not his property until then; but if personal receipt is in the construction of this court a necessary act, it is very difficult to maintain that if the bankrupt would not give a receipt during his life, and an arrear of interest accrued during his whole life, it would not be assets for his debts. It clearly would be so.

Next, is there in this will enough to show that, as this interest is not assignable by way of anticipation of any unreceived payment, therefore it cannot be assigned and transferred under the commission of bankruptcy? To prevent that it must be given to some one else; and unless it can be established that this by implication amounts to a limitation, giving this interest to the residuary legatee, it is an equitable interest, capable of being parted with. The principal, at the death of the bankrupt, will be under quite different circumstances. The testator had a right to limit his interest to his life; giving the principal to such person as may be his next of kin at his death, to take it as the personal estate, not of the son, but of him the testator, — as if it was the son's personal estate, but as the gift of the testator.

The demurrer must, upon the whole, be overruled.

¹ *Graves v. Dolphin*, 1 Sim. 66; *Woodmeston v. Walker*, 2 Russ. & M. 197; *Jones v. Salter*, 2 Russ. & M. 208 (assignee of married woman becoming discoverer); *Brown v. Pocock*, 2 Russ. & M. 210 (like last); *Jones v. Reese*, 65 Ala. 134 (assignee); *Bailie v. McWhorter*, 56 Ga. 183 (creditor); *Brock v. Brock*, 168 Ky. 846; *Dick v. Pitchford*, 1 Dev. & B. Eq. (N. C.) 490 (as-

BROADWAY NATIONAL BANK *v.* ADAMS.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1882.

133 Mass. 170.

MORTON, C. J. The object of this bill in equity is to reach and apply in payment of the plaintiff's debt due from the defendant Adams the income of a trust fund created for his benefit by the will of his brother. The eleventh article of the will is as follows: "I give the sum of seventy-five thousand dollars to my said executors and the survivors or survivor of them, in trust to invest the same in such manner as to them may seem prudent, and to pay the net income thereof, semiannually, to my said brother Charles W. Adams, during his natural life, such payments to be made to him personally when convenient, otherwise, upon his order or receipt in writing; in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment. At the decease of my said brother Charles, my will is that the net income of said seventy-five thousand dollars shall be paid to his present wife, in case she survives him, for the benefit of herself and all the children of said Charles, in equal proportions, in the manner and upon the conditions the same as herein directed to be paid him during his life, so long as she shall remain single. And my will is, that, after the decease of said Charles and the decease or second marriage of his said wife, the said seventy-five thousand dollars, together with any accrued interest or income thereon which may remain unpaid, as herein above directed, shall be divided equally among all the children of my said brother Charles, by any and all his wives, and the representatives of any deceased child or children by right of representation."

There is no room for doubt as to the intention of the testator. It is clear that, if the trustee was to pay the income to the

signee); *Pace v. Pace*, 73 N. C. 119 (assignee; but see *Munroe v. Trenholm*, 112 N. C. 634, 114 N. C. 590; and see N. C. Revisal, 1908, sec. 1588, allowing spendthrift trust for \$500 *per annum* in favor of relatives of grantor); *Wallace v. Smith*, 2 Handy (Ohio) 78 (creditor); *Tillinghast v. Bradford*, 5 R. I. 205 (assignee in insolvency); *Heath v. Bishop*, 4 Rich Eq. (S. C.) 46 (creditor); *Hutchinson v. Maxwell*, 100 Va. 169 (creditor); *Honeker Sons v. Duff*, 101 Va. 675 (creditor), *accord*. See also Ames, 396n.; Perry, Trusts, sec. 386a.

plaintiff under an order of the court, it would be in direct violation of the intention of the testator and of the provisions of his will. The court will not compel the trustee thus to do what the will forbids him to do, unless the provisions and intention of the testator are unlawful.

The question whether the founder of a trust can secure the income of it to the object of his bounty, by providing that it shall not be alienable by him or be subject to be taken by his creditors, has not been directly adjudicated in this Commonwealth. The tendency of our decisions, however, has been in favor of such a power in the founder. *Braman v. Stiles*, 2 Pick. 460. *Perkins v. Hays*, 3 Gray, 405. *Russell v. Grinnell*, 105 Mass. 425. *Hall v. Williams*, 120 Mass. 344. *Sparhawk v. Cloon*, 125 Mass. 263.

It is true that the rule of the common law is, that a man cannot attach to a grant or transfer of property, otherwise absolute, the condition that it shall not be alienated; such condition being repugnant to the nature of the estate granted. Co. Lit. 223a. *Blackstone Bank v. Davis*, 21 Pick. 42.

Lord Coke gives as the reason of the rule, that "it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien," and that this is "against the height and puritie of a fee simple." By such a condition, the grantor undertakes to deprive the property in the hands of the grantee of one of its legal incidents and attributes, namely, its alienability, which is deemed to be against public policy. But the reasons of the rule do not apply in the case of a transfer of property in trust. By the creation of a trust like the one before us, the trust property passes to the trustee with all its incidents and attributes unimpaired. He takes the whole legal title to the property, with the power of alienation; the *cestui que trust* takes the whole legal title to the accrued income at the moment it is paid over to him. Neither the principal nor the income is at any time inalienable.

The question whether the rule of the common law should be applied to equitable life estates created by will or deed, has been the subject of conflicting adjudications by different courts, as is fully shown in the able and exhaustive arguments of the counsel in this case. As is stated in *Sparhawk v. Cloon*, above cited, from the time of Lord Eldon the rule has prevailed in the English Court of Chancery, to the extent of holding that

when the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the *cestui que trust*, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a ceaser or limitation of the estate itself, can protect it from his debts. *Brandon v. Robinson*, 18 Ves. 429. *Green v. Spicer*, 1 Russ. & Myl. 395. *Rochford v. Hackman*, 9 Hare, 475. *Trappes v. Meredith*, L. R. 9 Eq. 229. *Snowdon v. Dales*, 6 Sim. 524. *Rippon v. Norton*, 2 Beav. 63.

The English rule has been adopted in several of the courts of this country. *Tillinghast v. Bradford*, 5 R. I. 205. *Heath v. Bishop*, 4 Rich. Eq. 46. *Dick v. Pitchford*, 1 Dev. & Bat. Eq. 480. *Mebane v. Mebane*, 4 Ired. Eq. 131.

Other courts have rejected it, and have held that the founder of a trust may secure the benefit of it to the object of his bounty, by providing that the income shall not be alienable by anticipation, nor subject to be taken for his debts. *Holdship v. Patterson*, 7 Watts, 547. *Shankland's appeal*, 47 Penn. St. 113. *Rife v. Geyer*, 59 Penn. St. 393. *White v. White*, 30 Vt. 338. *Pope v. Elliott*, 8 B. Mon. 56. *Nichols v. Eaton*, 91 U. S. 716. *Hyde v. Woods*, 94 U. S. 523.

The precise point involved in the case at bar has not been adjudicated in this Commonwealth; but the decisions of this court which we have before cited recognize the principle, that, if the intention of the founder of a trust, like the one before us, is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity. It seems to us that this principle extends to and covers the case at bar. The founder of this trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift with such restrictions or limitations, not repugnant to law, as he saw fit to impose. His clear intention, as shown in his will, was not to give his brother an absolute right to the income which might hereafter accrue upon the trust fund, with the power of alienating it in advance, but only the right to receive semi-annually the income of the fund, which upon its payment to him, and not before, was to become his absolute property. His intentions ought to be carried out, unless they are against public policy. There is nothing in the nature or tenure of the

estate given to the *cestui que trust* which should prevent this. The power of alienating in advance is not a necessary attribute or incident of such an estate or interest, so that the restraint of such alienation would introduce repugnant or inconsistent elements.

We are not able to see that it would violate any principles of sound public policy to permit a testator to give to the object of his bounty such a qualified interest in the income of a trust fund, and thus provide against the improvidence or misfortune of the beneficiary. The only ground upon which it can be held to be against public policy is, that it defrauds the creditors of the beneficiary.

It is argued that investing a man with apparent wealth tends to mislead creditors, and to induce them to give him credit. The answer is, that creditors have no right to rely upon property thus held, and to give him credit upon the basis of an estate which, by the instrument creating it, is declared to be inalienable by him, and not liable for his debts. By the exercise of proper diligence they can ascertain the nature and extent of his estate, especially in this Commonwealth, where all wills and most deeds are spread upon the public records. There is the same danger of their being misled by false appearances, and induced to give credit to the equitable life tenant when the will or deed of trust provides for a cesser or limitation over, in case of an attempted alienation, or of bankruptcy or attachment, and the argument would lead to the conclusion that the English rule is equally in violation of public policy. We do not see why the founder of a trust may not directly provide that his property shall go to his beneficiary with the restriction that it shall not be alienable by anticipation, and that his creditors shall not have the right to attach it in advance, instead of indirectly reaching the same result by a provision for a cesser or a limitation over, or by giving his trustees a discretion as to paying it. He has the entire *jus disponendi*, which imports that he may give it absolutely, or may impose any restrictions or fetters not repugnant to the nature of the estate which he gives. Under our system, creditors may reach all the property of the debtor not exempted by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given.

The rule of public policy which subjects a debtor's property to the payment of his debts, does not subject the property of a donor to the debts of his beneficiary, and does not give the

creditor a right to complain that, in the exercise of his absolute right of disposition, the donor has not seen fit to give the property to the creditor, but has left it out of his reach.

Whether a man can settle his own property in trust for his own benefit, so as to exempt the income from alienation by him or attachment in advance by his creditors, is a different question, which we are not called upon to consider in this case. But we are of opinion that any other person, having the entire right to dispose of his property, may settle it in trust in favor of a beneficiary, and may provide that it shall not be alienated by him by anticipation, and shall not be subject to be seized by his creditors in advance of its payment to him.

It follows that, under the provisions of the will which we are considering, the income of the trust fund created for the benefit of the defendant Adams cannot be reached by attachment, either at law or in equity, before it is paid to him.

*Bill dismissed.*¹

¹ *Nichols v. Eaton*, 91 U. S. 716 (trustee in bankruptcy); *Fortner v. Phillips*, 124 Ark. 395 (creditor); *Seymour v. McAvoy*, 121 Cal. 438; *Mason v. R. I. etc. Co.*, 78 Conn. 81; *Holmes v. Bushnell*, 80 Conn. 233 (assignee); *Steib v. Whitehead*, 111 Ill. 247 (creditor); *Meek v. Briggs*, 87 Iowa 610 (creditor); *Bank v. Crist*, 140 Iowa 308 (*semble*, creditors cannot reach amount needed for support of beneficiary "in accordance with his station in life"); *Sherman v. Havens*, 94 Kan. 654 (creditor, *semble*); *Roberts v. Stevens*, 84 Me. 325 (creditor); *Smith v. Towers*, 69 Md. 67 (creditor); *Jackson Sq. Assn. v. Bartlett*, 95 Md. 661 (creditor); *Billings v. Marsh*, 153 Mass. 311 (assignee in insolvency); *Munroe v. Dewey*, 176 Mass. 184 (trustee in bankruptcy); *Leigh v. Harrison*, 69 Miss. 923 (creditor); *Lampert v. Haydel*, 96 Mo. 439 (assignee); *Partridge v. Cavender*, 96 Mo. 452 (creditor); *Weller v. Noffsinger*, 57 Neb. 455 (creditor; equitable term for years); *Mattison v. Mattison*, 53 Ore. 254; *Stambaugh's Est.*, 135 Pa. 585; *Mehaffey's Est.*, 139 Pa. 276 (assignee); *Board of Charities v. Lockard*, 198 Pa. 572 (wife and child claiming maintenance); *Ewalt v. Davenport*, 257 Pa. 385; *Barnes v. Dow*, 59 Vt. 530 (assignee); *Hoffman v. Beltzhoover*, 71 W. Va. 72 (creditor), *accord*. See also *Ames*, 400n.; *Perry*, Trusts, sec. 686a; *Pomeroy*, Eq. Juris., sec. 989n.; 3 Ann. Cas. 586; 18 Ann. Cas. 218; Ann. Cas. 1918C 965; Dec. Dig., Trusts, secs. 12, 152.

In *Kessner v. Phillips*, 189 Mo. 515, it is suggested that though a spendthrift trust is valid as to income, it is invalid as to an equitable life estate where the *cestui que trust* is entitled to possession.

Where spendthrift trusts are allowed no particular form of words is necessary to create such a trust. *Seymour v. McAvoy*, 121 Cal. 438; *Berry v. Dunham*, 202 Mass. 133; *Ewalt v. Davenport*, 257 Pa. 385; Ann. Cas. 1917 B 394.

It is well settled that a man cannot settle his own property upon trust for himself so as to exclude transferees or creditors. *Ames*, 400n. See also

McColgan v. Magee, 172 Cal. 182; Schenck v. Barnes, 156 N. Y. 316; Egbert v. de Solms, 218 Pa. 207; 19 Ann. Cas. 271; 12 L. R. A. (n. s.) 369.

A restraint on the alienation of a legal interest in fee simple or an absolute interest in personalty is invalid. Jones v. Port Huron Engine Co., 171 Ill. 502; Clark v. Clark, 99 Md. 356 (restraint for 10 years); Gischell v. Ballman, 131 Md. 260; Lathrop v. Merrill, 207 Mass. 6; Loosing v. Loosing, 85 Neb. 66; Krueger v. Frederick, 88 N. J. Eq. 258 (restraint until the youngest child becomes of age); Gray, Restraints, secs. 19, 23. But see *contra* Morton's Gd'n v. Morton, 120 Ky. 251 (valid by statute allowing restraint on alienation for not longer than period of perpetuities).

A restraint on the alienation of a legal life estate is also invalid. Henderson v. Harness, 176 Ill. 302; Streit v. Fay, 230 Ill. 319; Thompson v. Murphy, 10 Ind. App. 464; Maynard v. Cleaves, 149 Mass. 307; Bramhall v. Ferris, 14 N. Y. 41 (*semble*); Wool v. Fleetwood, 136 N. C. 460; Mattison v. Mattison, 53 Ore. 254 (*semble*); Hahn v. Hutchinson, 159 Pa. 133; Gray, Restraints, sec. 134.

In Illinois and Massachusetts restraints on the alienation of an equitable interest in fee simple or of an absolute equitable interest in personalty is valid. Wallace v. Foxwell, 250 Ill. 616; Hopkinson v. Swaim, 284 Ill. 11; Boston Safe D. & T. Co. v. Collier, 222 Mass. 394. Cf. Siegworth Est., 226 Pa. 591. But the great weight of authority is opposed to these cases. Ullman v. Cameron, 186 N. Y. 339; Bergmann v. Lord, 194 N. Y. 70; Morgan's Estate (No. 1), 223 Pa. 228; Gray, Restraints, sec. 19; Perry, Trusts, 386n. Cf. Nightingale v. Phillips, 22 R. I. 175.

A restraint on alienation, which is otherwise valid, is invalid if it is to be effective for too long a time. Gray, Perp., sec. 121ii. See Kales, Cas. Fut. Int., 981-1019; Hopkinson v. Swaim, 284 Ill. 11.

A *forfeiture* upon alienation of a life estate, legal or equitable, or a term for years, created by a third person, is valid even in England. Ames, 395n.; Gray, Restraints, secs. 73-103. But a forfeiture upon alienation of a fee simple or absolute interest, legal or equitable, is generally held invalid. Potter v. Couch, 141 U. S. 296, 314; Female Orphan Society v. Y. M. C. A., 119 La. 278. But see *Re Leach*, [1912] 2 Ch. 422, criticized 33 L. Quart. Rev. 114; *ibid.* 236-241. It is immaterial that the provision for forfeiture is limited in time. *Re Rosher*, 26 Ch. Div. 801; *Re Carr*, 20 Brit. Col. R. 82; Kessner v. Phillips, 189 Mo. 515; Gray, Rule ag. Perp., sec. 121j; Gray, Restraints, secs. 47-54. In *Re Dempster*, [1915] 1 Ch. 795, it was held that a provision for forfeiture on alienation of an annuity for life is valid.

In some states the rights of creditors of the *cestui que trust* are regulated by statute, the creditors being excluded altogether or allowed to reach only a part of the income. See *ante*, p. 599.

In some states statutes restrain alienation of his interest by the *cestui que trust*. See *ante*, p. 585. In others statutes provide that alienation may be restrained during his life or for a term of years by the instrument creating the trust. Cal. Civ. Code, sec. 867; N. Dak. Comp. L., 1913, sec. 5377; Okla. R. L., 1910, sec. 6672; S. Dak. Civ. Code, sec. 315.

EATON *v.* BOSTON TRUST COMPANY.

SUPREME COURT OF THE UNITED STATES. 1916.

240 U. S. 427.

THE facts, which involve the construction and application of §70a (5) of the Bankruptcy Act, and of the rights of the life tenant in a trust fund created under the laws of Massachusetts, are stated in the opinion.

HOLMES, J. This is a bill for instructions, brought by the Trust Company, the principal defendant in error, to ascertain whether a fund bequeathed to it in trust for Mrs. Luke, codefendant in error, passed to her trustee in bankruptcy. The bequest was of seventy-five thousand dollars, "The whole of the net income thereof to be paid my adopted daughter, Fannie Leighton Luke, wife of Otis H. Luke, of said Brookline during her life quarterly in each and every year together with such portion of the principal of said trust fund as shall make the amount to be paid her at least Three Thousand Dollars a year during her life, said income to be free from the interference or control of her creditors." It is established law in Massachusetts that such trusts are valid and effective against creditors, *Broadway National Bank v. Adams*, 133 Mass., 170, and, subject to what we are about to say, against assignees in insolvency or trustees in bankruptcy. *Billings v. Marsh*, 153 Mass., 311. *Munroe v. Dewey*, 176 Mass., 184. The trustee in bankruptcy seeks to avoid the effect of these decisions on the ground that Mrs. Luke's equitable life interest was held by the Supreme Court of the State to be assignable, and that therefore it passed under §70a (5) of the Bankruptcy Act, vesting in the trustee all property that the bankrupt "could by any means have transferred." The Supreme Judicial Court, however, held that the above cited cases governed and that the property did not pass. 220 Mass., 484.

If it be true without qualification that the bankrupt could have assigned her interest and by so doing could have freed from the trust both the fund and any proceeds received by her, the argument would be very strong that the statute intended the fund to pass. There would be an analogy at least with the provision giving the trustee all powers that the bankrupt might have exercised for her own benefit, §70a (3), and there would be

difficulty in admitting that a person could have property over which he could exercise all the powers of ownership except to make it liable for his debts. The conclusion that the fund was assignable was based on two cases, and we presume was meant to go no farther than their authority required. The first of these simply held that an executor was not liable on his bond for paying over an annuity to an assignee as it fell due, when the assignor to whom it was bequeathed free from creditors had not attempted to avoid his act. *Ames v. Clarke*, 106 Mass., 573. The other case does not go beyond a dictum that carries the principle no farther. *Huntress v. Allen*, 195 Mass., 226. It is true that where the restriction has been enforced there generally has been a clause against anticipation, but the present decision in following them holds the restricting clause paramount, and therefore we feel warranted in assuming that the power of alienation will not be pressed to a point inconsistent with the dominant intent of the will. Whether if that power were absolute the restriction still should be upheld as in case of a statutory exemption that leaves the bankrupt free to convey his rights it is unnecessary to decide.

The law of Massachusetts treats such restrictions as limiting the character of the equitable property and inherent in it. *Dunn v. Dobson*, 198 Mass., 142, 146. *Lathrop v. Merrill*, 207 Mass., 6, 9. Whatever may have been the criticisms upon the policy and soundness of the doctrine, and whatever may be the power of this court to weigh the reasoning upon which it has been established by the Massachusetts cases, *Page v. Edmunds*, 187 U. S. 596, 602, it has been established too long and is too nearly sanctioned by the decisions of this court to be overthrown here. *Nichols v. Eaton*, 91 U. S. 716. *Shelton v. King*, 229 U. S. 90, 99. The policy of the Bankruptcy Act is to respect state exemptions, and until the Massachusetts decisions shall have gone farther than they yet have we are not prepared to say that the present bequest is not protected by the Massachusetts rule.

*Decree affirmed.*¹

¹ But see *Hopkinson v. Swaim*, 284 Ill. 11. Cf. *Croom v. Ocala etc. Co.* 62 Fla. 460 (if interest assignable, creditors can reach it).

HULL *v.* FARMERS' LOAN & TRUST COMPANY.

SUPREME COURT OF THE UNITED STATES. 1917.

245 U. S. 312.

BRANDEIS, J. Charles Palmer, of New York City, by will executed shortly before his death, bequeathed to the Farmers' Loan & Trust Company the sum of \$50,000, in trust, to pay the income to his son Francis, during his life, with a remainder over to others, subject to the "wish . . . that . . . my said son shall have the principal of said trust fund whenever he shall become financially solvent and able to pay all his just debts and liabilities from resources other than the principal of this trust fund."

Promptly after probate of the will, Francis filed a voluntary petition in bankruptcy, and in due time received his discharge. Then the Trust Company instituted proceedings in the Surrogate Court for a judicial settlement of the estate; and, the court adjudging that Francis had become entitled to the principal of the trust fund (65 Misc. N. Y. 418), it was paid over to him. Later, the trustee in bankruptcy who had not been a party to proceedings in the Surrogate Court, brought suit in the Supreme Court of New York against the Trust Company and Francis to recover the principal. He claimed that the right to it had passed to him under §70a (5) of the Bankruptcy Act of 1898, c. 541, 30 Stat. 544, and that the whole fund was required to satisfy the balance due on debts proved against the bankrupt estate and the expenses of administration. No claim was asserted against the income of the trust fund. A complaint setting forth these facts was dismissed on demurrer; and the judgment entered by the trial court was affirmed both by the Appellate Division (155 App. Div. 636) and by the Court of Appeals (213 N. Y. 315). The case comes here on writ of error.

Plaintiff asserts that the case presents this federal question: Does a contingent interest in the principal of personal property assignable by the bankrupt prior to the filing of the petition necessarily pass to his trustee in bankruptcy? And, to sustain his claim to recovery, he contends, that under the law of New York (1) the words used by the testator create a trust; (2) vesting in the beneficiary a contingent interest in personal property; (3) which is an expectant estate; (4) assignable by him; and (5) that, in view of the Surrogate's decision and the action

thereon, the defendants are estopped from denying that the contingency requiring payment of the principal had arisen. Plaintiff contends also that, under the federal law, (6) this assignable estate in expectancy passed to the trustee when Francis was adjudged bankrupt, and (7) the trustee, as holder of the estate became entitled to the principal when the discharge rendered Francis solvent.

We need not enquire whether the several propositions of state and federal law which underlie this contention are correct. This is not a case where a testator seeks to bequeath property which shall be free from liability for the beneficiary's debts. *Ullman v. Cameron*, 186 N. Y. 339, 345. Here the testator has merely prescribed the condition on which he will make a gift of the principal. Under the law of New York he had the right to provide, in terms, that such payment of the principal should be made, only if and when Francis should have received in bankruptcy a discharge from his debts and that no part of the fund should go to his trustee in bankruptcy. The language used by the testator is broader in scope, but manifests quite as clearly, his intention that the principal shall not be paid over under circumstances which would result in any part of it being applied in satisfying debts previously incurred by Francis. The Bankruptcy Act presents no obstacle to carrying out the testator's intention. *Eaton v. Boston Safe Deposit and Trust Co.*, 240 U. S. 427. As the Court of Appeals said: "The nature of the condition itself determines the controversy." The judgment is

*Affirmed.*¹

In re BULLOCK.

GOOD v. LICKORISH.

CHANCERY. 1891.

60 L. J. Ch. 341.

By the will and codicil of Edwin Bullock (who died on the 14th of February, 1870), all the real and personal estate of the testator were vested in the plaintiffs Charles Patten Good and Henry Williams, and the testator's widow Mary Bullock, his executors and trustees, in trust for the testator's children, and the issue born in his lifetime of Mary Bullock, as she should by

¹ See *Siemers v. Morris*, 169 N. Y. App. Div. 411. But see *Davidson v. Chalmers*, 33 Beav. 653; *Gray, Restraints*, sec. 167a.

deed or will appoint, and, failing such appointment, and so far as the same should not extend, in trust for those of his six children who should be living at her death, and the issue of such as should be then dead leaving issue.

Mary Bullock, by her will dated the 29th of May, 1883, directed and appointed as follows:—

“My late husband’s trustees or trustee shall stand possessed of 15,000*l.*, further part of the said net proceeds, upon trust to invest the same in some or one of the modes of investment by law authorized for the investment of trust funds, and to pay the income of such investments to the said Theodore Walter William Bullock, during his life or until he shall become a bankrupt or a liquidating debtor, or cease to be entitled to receive such income, or any part thereof, for his own personal use or benefit, by any means or for any purpose. And in the event of, and upon the said T. W. W. Bullock becoming a bankrupt or a liquidating debtor, or ceasing to be entitled to receive the said income, or any part thereof, for his own personal use or benefit by any means or for any purpose, to pay to him or apply for his benefit, during the remainder of his life, either the whole, or so much, and so much only of the said income, as my late husband’s trustees or trustee shall in their or his uncontrolled discretion think fit, and, subject to the aforesaid interest hereinbefore appointed in favor of the said T. W. W. Bullock, my late husband’s trustees or trustee shall hold the said 15,000*l.*, and the investments and income (including my accumulations of income) thereof, in trust for the child, if only one, or all the children equally if more than one, born in my lifetime, of the said T. W. W. Bullock, and if there be no such child, in trust for the said William Bullock, Mary Holyoake Bullock, Constance Bullock, and Dorothy Marian Good as tenants in common in equal shares.”

The testatrix died on the 29th of December, 1886, and her will, and several codicils which did not affect the above appointment, were proved by her executors, the plaintiffs Charles Patten Good and Henry Williams, on the 15th of February, 1887.

The above-named T. W. W. Bullock was a son of the testator and testatrix, and W. Bullock, M. H. Bullock, and C. Bullock, were the children of E. L. Bullock, a son of the testator and testatrix, who died in the lifetime of the latter, and E. M. Good was a child of L. M. Good, a daughter of the testator and testatrix.

The trustees invested the 15,000*l.* in the purchase of 12,011*l.* London and North-Western Railway Company 4 per cent. perpetual debenture stock, the interest on which was payable on the 15th of January and 15th of July, and the interest was paid to T. W. W. Bullock up to and including the 16th of July, 1890.

On the 23rd of August, 1890, the trustees received notice of a memorandum of charge dated the 30th of January, 1889, from T. W. W. Bullock to Lickorish & Bellord, solicitors, on all his interest under the will of the testatrix to secure money of which about 500*l.* was stated to be owing.

On the 23rd of October 1890, a receiving order was made against T. W. W. Bullock, and on the 14th of November, 1890, the trustees received a notice that the official receiver claimed the 12,011*l.* stock as trustee in the bankruptcy of T. W. W. Bullock; he subsequently claimed the proportion of interest due at the date of the receiving order; but the claims of the trustee were afterwards withdrawn. The trustees took out an originating summons, asking (*inter alia*) whether the plaintiffs properly might during the life of T. W. W. Bullock apply the whole, or any, and what part, of the income of the trust fund in providing in such manner as they might from time to time think fit for the past and future lodging, board, clothing, maintenance, and support of T. W. W. Bullock, and the payment of sundry legal expenses incurred by him or on his behalf in and since July, 1890, or how the said income ought to be dealt with by the plaintiffs.

This summons was adjourned into Court.

KEKEWICH, J. At the conclusion of the arguments on this point, I held that the particular assignee represented by Mr. Maidlow was not entitled to any part of the income in which Theodore Walter William Bullock takes an interest under the will. He only claimed that which accrued before notice of his assignment was given to the trustees of the will, and that on the ground that until such notice was given the assignment was not perfect, and Mr. Bullock could not until then be said to have ceased to be entitled to receive the income for his own personal use or benefit. I held that, although for some and important purposes the assignment might fairly be said to be not perfect until notice given, yet, as between assignor and assignee, it was perfect as from its date, and operated a cesser of the assignor's title to receive the income. I advert to this now because, with

reference to the point remaining to be decided, it is important to observe that the particular assignee has no interest. It is also important to observe that the general assignee — that is, the trustee in bankruptcy — makes no claim. He has abstained from doing so deliberately, and I have no doubt wisely. He could not, so far as I can see, have put forward any tenable argument in support of a claim if made. The question is therefore raised as between Mr. Bullock and those entitled under the gift over — or rather such of them as claim adversely to him, for they do not all act together or take the same view. Mr. Warmington's argument for them was that the language of the will only empowers the trustees to pay the income to Mr. Bullock or to apply it for his benefit, and that neither of these things can be done. As regards payment, reliance was placed on the decision in *In re Coleman*, *Henry v. Strong*, 39 Ch. D. 443, and my own judgment in *In re Neil*, *Hemming v. Neil*, 62 L. T. Rep. 649, to which, on reflection, I adhere; and it was said that to pay income to Mr. Bullock would be to make a payment in derogation of the overriding title of the trustee in bankruptcy, and therefore a wrongful payment, which would be no discharge to the trustees of the will, and would render them accountable to the trustee in bankruptcy. That argument is, I think, well founded. As regards applications for the benefit of Mr. Bullock, the argument took this form: — It was said that where the Court has upheld a discretionary trust for application, arising on bankruptcy, or the equivalent of bankruptcy, the discretion has been exercisable with reference to wife and children as well as the bankrupt, and the decisions of the Court have proceeded on the impossibility of determining beforehand what, if anything, the trustees would, in the exercise of their discretion, apply for the benefit of the bankrupt as distinguished from the other objects of their power. For this, reference was made to two cases as examples of a class, — *Godden v. Crowhurst*, 10 Sim. 642, and *Kearsley v. Woodcock*, 3 Hare 185. The language of the judgments, and especially that of Vice-Chancellor Shadwell in *Godden v. Crowhurst*, countenances the argument, but the precise point which I have now to consider was not before the Court in either case, and I cannot think that either Judge intended to decide it. I can see no reason on principle for defeating the obvious intention of the testatrix. That obvious intention was to enable the trustees, in the event of Mr. Bullock's bankruptcy, to apply for his benefit the income, or an adequate

part of the income, which he thereupon ceased to be entitled to receive. It is clear, and the trustee in bankruptcy has practically admitted, that he can take no interest in income thus applied; and it is difficult to see how those entitled under the gift over can successfully claim as coming to them what, if it does not come to them, would not go to the trustee in bankruptcy. The argument in opposition to their claim is strongly supported by *Chambers v. Smith*, 3 App. Cas. 795. It is a Scotch case, but the Scotch law was expressly stated to be on this point in no way different from that of England. It was there held that trustees possessing a discretionary power, such as the trustees of this will possess, might exercise it in favor of the beneficiaries occupying Mr. Bullock's position, notwithstanding arrestment by judgment creditors. The law is expounded by the several learned Lords who gave their opinions to the House, but it will suffice to refer to those of Lord Chancellor Hatherley and Lord Blackburn. There is a passage in the Lord Chancellor's judgment (p. 804) which seems to me directly applicable to the case in hand. It may be thus applied: Mr. Bullock has no control over the fund when the trustees resolve to exercise their discretionary power. He cannot, and no one claiming through him can, make a claim against the trustees for payment. It would be a sufficient answer to any such claim to say, "We have postponed such payment to you personally, and intend ourselves to apply the money for your behoof." And on page 807 he says, "If I am correct in holding as I do that the trust powers could not be destroyed by the objects of them becoming indebted, which, indeed, seems the time at which the testator would have desired them to be brought into action, then the trustees are not innovating, but only exercising their rights as conferred upon them by their truster at their own discretion." On page 817 Lord Blackburn notices the great and fundamental difference between a gift to one, either direct or through the medium of trustees, who are mere conduit-pipes to convey the gift to the beneficiary, and a gift subject to a power reserved to trustees, to be exercised paramount to the beneficiary and in his despite; and adds, "I think the arrestment fixes the date at which it is to be determined whether the arresters have a right to attach the fund, and anything that is subsequently done by the debtor, or by those who have rights against the debtor, or by those who claim under him, comes too late after that." In other words, the assignment in

this case, which is equivalent to the arrestment in the case before the House of Lords, called the discretionary power of the trustees into operation; and it would be a contradiction to hold that the power is inoperative just when it was intended to be exercised. What the trustees, in the exercise of their discretion, do not from time to time think fit to apply for the benefit of Mr. Bullock goes, by the words of the will, to those entitled under the gift over; but they take only this overplus, and cannot claim what the trustees determine to apply. I was asked by the trustees to define the limits within which they may apply the income for Mr. Bullock's benefit. I find it extremely difficult to do this in the abstract, and I am unwilling to fetter the trustees' discretion, which was intended to be, and ought to be construed as, large. I could not refuse to determine any particular question submitted by them to the Court, and if any real difficulty occurs, they would probably be justified in asking the Court's protection. I can say no more at present than that they certainly may, in my opinion, spend the whole or any part of the income in maintenance, using that word in its most general and widest sense; and I doubt whether I was right in saying in the course of the argument that they could not properly pay Mr. Bullock's debts. The discretion is vested in them, and though, as already mentioned, they are entitled to the assistance of the Court if a case of real difficulty occurs, they must exercise it; and so long as they exercise it honestly — that is, as men of ordinary business habits and prudence, and with due regard to all the circumstances of the case — the Court will not interfere with them.¹

¹ If the trustees are directed to *apply* the whole or a certain amount of the income of a trust fund for the benefit or support of A, although at such times and in such manner as the trustees deem fit, A's assignee, creditor or trustee in bankruptcy may, in jurisdictions following *Brandon v. Robinson*, demand from the trustees the income or such part thereof as the *cestui que trust* was entitled to demand. *Green v. Spicer*, 1 R. & My. 395; *Snowdon v. Dales*, 6 Sim. 524; *Younghusband v. Gisborne*, 1 Coll. 400; *Dick v. Pitchford*, 1 Dev. & B. Eq. (N. C.) 480; *Pace v. Pace*, 73 N. C. 119; *Hutchinson v. Maxwell*, 100 Va. 169. But see *contra*, *Godden v. Crowhurst*, 10 Sim. 642.

If the trustees may in their discretion refuse to pay to A or apply for his benefit any portion of the income, and they do not so pay or apply any part of the income, his assignee, creditor or trustee in bankruptcy cannot demand any part of the income. *Twopeny v. Payton*, 10 Sim. 486; *Lord v. Bunn*, 2 Y. & C. C. C. 98; *Holmes v. Penney*, 3 K. & J. 90; *Chambers v. Smith*, 3 App. Cas. 795; *Davidson v. Kemper*, 79 Ky. 5; *Baker v. Brown*, 146 Mass. 369; *Slattery v. Wason*, 151 Mass. 266; *Brown v. Lumbert*, 221 Mass. 419; *Wolfman v. Webster*, 77 N. H. 24; *Keyser v. Mitchell*, 67 Pa. 473; *Stone v.*

DEARLE v. HALL.

CHANCERY. 1828.

3 Russ. 1, 48.

THE LORD CHANCELLOR [LYNDHURST].¹ The cases of *Dearle v. Hall* and *Loveridge v. Cooper* were decided by Sir Thomas Plumer; and from his decree there is in each of them an appeal, which stands for judgment. As the two cases depend on the same principle, though the facts are, to a certain degree, different, the better course will be to dispose of both together; and as *Dearle v. Hall* was the first of the two which came before the court below, though it was not argued on appeal till after *Loveridge v. Cooper* had been heard, I shall first direct my attention to the facts on which it depends.

Zachariah Brown was entitled, during his life, to about 93*l.* a year, being the interest arising from a share of the residue of his father's estate, which, in pursuance of the directions in his father's will, had been converted into money, and invested in the names of the executors and trustees. Among those executors *Wescott*, 18 R. I. 517; *Heath v. Bishop*, 4 Rich. Eq. (S. C.) 46 (*semble*); *Staub v. Williams*, 5 Lea (Tenn.) 458. See also *Re Landon*, 40 L. J. Ch. 370; *Train v. Clapperton*, [1908] A. C. 342.

If the trust is for the support of A and others, for example his wife or his family, in some cases it is held that A cannot insist upon any part of the income nor can his assignee, creditor or trustee in bankruptcy. *Holmes v. Penney*, 3 K. & J. 90; *Durant v. Hosp. Life Ins. Co.*, 2 Low. (U. S.) 575; *Hill v. MacRae*, 27 Ala. 175; *Bell v. Watkins*, 82 Ala. 512; *Tolland etc. Co. v. Underwood*, 50 Conn. 493; *Nickell v. Handy*, 10 Gratt. (Va.) 336. But in some cases the beneficial interest has been held to be severable and the assignee, creditor or trustee in bankruptcy has been held entitled to the whole income except a proper allowance for the wife or family. *Page v. Way*, 3 Beav. 20; *Kearsley v. Woodcock*, 3 Hare 185; *Wallace v. Anderson*, 16 Beav. 533; *Jones v. Reese*, 65 Ala. 134. In *Honeker Sons v. Duff*, 101 Va. 675, it was held that the words "and his family" merely indicated the motive of the testator, and the creditors were allowed to reach the whole income.

If the trustees are directed to pay to A or apply for his benefit so much of the income as in their discretion they think fit, it has been held that they are accountable to A's assignee, creditor or trustee in bankruptcy for payments made to A after notice. *Lord v. Bunn*, 2 Y. & C. C. C. 98; *Re Coleman*, 39 Ch. D. 443; *Re Neil*, 62 L. T. N. S. 649. And A is also accountable for what he has received. *Re Ashby*, [1892] 1 Q. B. 872. On the question whether they are responsible if income is not paid to A but is applied for his benefit, see *Re Coleman*, 39 Ch. D. 443. But see *Lord v. Bunn*, 2 Y. & C. C. C. 98; *Gray, Restraints*, sec. 167j.

¹ Only the opinion of the Chancellor is here given.

tors and trustees was a solicitor of the name of Unthank, who took the principal share in the management of the trust. Zachariah Brown, being in distress for money, in consideration of a sum of 204*l.*, granted to Dearle, one of the plaintiffs in the suit, an annuity of 37*l.* a year, secured by a deed of covenant and a warrant of attorney of the grantor and a surety; and, by way of collateral security, Brown assigned to Dearle all his interest in the yearly sum of 93*l.*: but neither Dearle nor Brown gave any notice of this assignment to the trustees under the father's will.

Shortly afterwards, a similar transaction took place between Brown and the other plaintiff, Sherring, to whom an annuity of 27*l.* a year was granted. The securities were of a similar description; and, on this occasion, as on the former, no notice was given to the trustees.

These transactions took place in 1808 and 1809. The annuities were regularly paid till June, 1811; and then, for the first time, default was made in payment.

Notwithstanding this circumstance, Brown, in 1812, publicly advertised for sale his interest in the property under his father's will. Hall, attracted by the advertisement, entered, through his solicitor, Mr. Patten, into a treaty of purchase; and it appears from the correspondence between Mr. Patten and Mr. Unthank that the former exercised due caution in the transaction, and made every proper inquiry concerning the nature of Brown's title, the extent of any incumbrances affecting the property, and all other circumstances of which it was fit that a purchaser should be apprised. No intimation was given to Hall of the existence of any previous assignment; and, his solicitor being satisfied, he advanced his money for the purchase of Brown's interest, and that interest was regularly assigned to him. Mr. Patten requested Unthank to join in the deed; but Mr. Unthank said, "I do not choose to join in the deed; and it is unnecessary for me to do so, because Z. Brown has an absolute right to this property, and may deal with it as he pleases." The first half-year's interest, subject to some deductions, which the trustees were entitled to make, was duly paid to Hall; and, shortly afterwards, Hall for the first time ascertained that the property had been regularly assigned, in 1808 and 1809, to Dearle and to Sherring.

Sir Thomas Plumer was of opinion that the plaintiffs had no right to the assistance of a court of equity to enforce their claim to the property as against the defendant Hall, and that, having neglected to give the trustees notice of their assignments, and

having enabled Z. Brown to commit this fraud, they could not come into this court to avail themselves of the priority of their assignments in point of time, in order to defeat the right of a person who had acted as Hall had acted, and who, if the prior assignments were to prevail against him, would necessarily sustain a great loss. In that opinion I concur.

It was said that there was no authority for the decision of the Master of the Rolls, — no case in point to support it; and certainly it does not appear that the precise question has ever been determined, or that it has been even brought before the court, except, perhaps, so far as it may have been discussed in an unreported case of *Wright v. Lord Dorchester*. But the case is not new in principle. Where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and the vendee, but as to third persons, in order that they may not be deceived by apparent possession and ownership remaining in a person, who, in fact, is not the owner. This doctrine is not confined to chattels in possession, but extends to *choses in action*, bonds, &c.; in *Ryall v. Rowles*, 1 Ves. Sen. 348, 1 Atk. 165, it is expressly applied to bonds, simple contract debts, and other *choses in action*. It is true that *Ryall v. Rowles* was a case in bankruptcy; but the Lord Chancellor called to his assistance Lord Chief Justice Lee, Lord Chief Baron Parker, and Mr. Justice Burnett; so that the principle on which the court there acted must be considered as having received most authoritative sanction. These eminent individuals, and particularly the Lord Chief Baron and Mr. Justice Burnett, did not, in the view which they took of the question before them, confine themselves to the case of bankruptcy, but stated grounds of judgment which are of general application. Lord Chief Baron Parker says, that, on the assignment of a bond debt, the bond should be delivered, and notice given to the debtor; and he adds, that, with respect to simple-contract debts, for which no securities are holden, such as book-debts for instance, notice of the assignment should be given to the debtor, in order to take away from the debtor the right of making payment to the assignor, and to take away from the assignor the power and disposition over the thing assigned. 1 Ves. Sen. 367; 2 Atk. 177. In cases like the present, the act of giving the trustee notice is, in a certain degree, taking possession of the fund; it is going as far towards equitable possession as it is possible to go; for, after notice given, the trustee of the fund becomes a trustee for

the assignee who has given him notice. It is upon these grounds that I am disposed to come to the same conclusion with the late Master of the Rolls.

I have alluded to a case of *Wright v. Lord Dorchester*, 3 Russ. 49n., which was cited as an authority in support of the opinion of the Master of the Rolls. In that case, a person of the name of Charles Sturt was entitled to the dividends of certain stock, which stood in the names of Lord Dorchester and another trustee. In 1793 Sturt applied to Messrs. Wright & Co., bankers at Norwich, for an advance of money, and, in consideration of the moneys which they advanced to him, granted to them two annuities, and assigned his interest in the stock as a security for the payment. No notice was given by Messrs. Wright & Co. to the trustees. It would appear that Sturt afterwards applied to one of the defendants, Brown, to purchase his life interest in the stock; Brown then made inquiry of the trustees, and they stated that they had no notice of any incumbrance on the fund: upon this B. completed the purchase, and received the dividends for upwards of six years. Messrs. Wright then filed a bill, and obtained an injunction, restraining the transfer of the fund or the payment of the dividends; but, on the answer of Brown, disclosing the facts with respect to his purchase, Lord Eldon dissolved that injunction. At the same time, however, that he dissolved the injunction, he dissolved it only on condition that Brown should give security to refund the money, if, at the hearing, the court should give judgment in favor of any of the other parties. That case was attended also with this particular circumstance, that the party who pledged the fund stated by his answer that, when he executed the security to Wright & Co., he considered that the pledge was meant to extend only to certain real estates. For these reasons I do not rely on the case of *Wright v. Lord Dorchester* as an authority; I rest on the general principle to which I have referred; and, on that principle, I am of opinion that the plaintiffs are not entitled to come into a court of equity for relief against the defendant Hall. The decree must, therefore, be affirmed, and the deposit paid to Hall.

The case of *Loveridge v. Cooper*, though the circumstances are somewhat different, is the same in principle with *Dearle v. Hall*, and must follow the same decision.¹

¹ In a number of states it is held that the rights of successive assignees of equitable interests or *choses* in action are determined by priority in time without

regard to notice to the trustee or obligor. *Thayer v. Daniels*, 113 Mass. 129 (*semble*); *Putnam v. Story*, 132 Mass. 205; *Muir v. Schenck*, 3 Hill (N. Y.) 228; *Central T. Co. v. West India Imp. Co.*, 169 N. Y. 314; *Meier v. Hess*, 23 Ore. 599; *Tingle v. Fisher*, 20 W. Va. 497.

In a number of states, as in England, it is held that if the later assignee purchases in good faith and for value without knowledge of the earlier assignment, he may, although he made no inquiry of the trustee or obligor, obtain priority by giving notice to the trustee or obligor, even after he has knowledge of the earlier assignment (*Mut. Life Ass. Soc. v. Langley*, 32 Ch. D. 460), unless the prior assignee gives notice to the trustee or obligor before he does; and on the other hand, the prior assignee prevails if he gives notice at any time before the later assignee gives notice. *Foster v. Cockerell*, 3 Cl. & Fin. 456, 9 Bligh N. s. 332; *Meux v. Bell*, 1 Hare 73; *Re Lake*, [1903] 1 K. B. 151; *Montefiore v. Guedalla*, [1903] 2 Ch. 37; *Re Dallas*, [1904] 2 Ch. 385; *Judson v. Corcoran*, 17 How. (U. S.) 612; *Spain v. Hamilton's Adm.*, 1 Wall. (U. S.) 604; *Re Hawley etc. Co.*, 233 Fed. 451; *Graham Paper Co. v. Pembroke*, 124 Cal. 117; *Widenmann v. Weniger*, 164 Cal. 667 (*semble*); *Lambert v. Morgan*, 110 Md. 1; *Jenkinson v. New York Finance Co.*, 79 N. J. Eq. 247; *Phillip's Est.*, 205 Pa. 515. See *Keasbey*, Notice of Assignments in Equity, 19 Yale L. J. 258; *Bispham*, Equity, secs. 168, 169; *Pomeroy*, Eq. Juris., sec. 695; 66 L. R. A. 760; Dec. Dig., Assignments, 83-85; 5 Corp. Jur. 953. As to what constitutes a sufficient notice, see *Ames*, 328.

The English doctrine as to priority of notice does not apply to successive assignments of equitable interests in land. *Lee v. Howlett*, 2 K. & J. 531; *Jones v. Jones*, 8 Sim. 633; *Ward v. Duncombe*, [1893] A. C. 369; *Taylor v. London etc. Co.*, [1901] 2 Ch. 231; *Ames*, 330n.; *Pomeroy*, Eq. Juris., sec. 697.

An assignee of an equitable interest or *chose* in action, according to the weight of authority even in jurisdictions which follow *Dearle v. Hall*, is preferred to a subsequent attaching or garnishing creditor, although the assignee has not given to the obligor notice of the assignment. *Third Nat. Bk. v. Atlantic City*, 126 Fed. 413; *Steltzer v. Condon*, 139 Iowa 754; *Phillip's Est.*, 205 Pa. 525; *Ames*, 413; *Pomeroy*, Eq. Juris., sec. 694; Dec. Dig., Assignments, 86; 5 Corp. Jur. 972.

The first assignee may by his conduct estop himself from relying upon his priority. *Mills v. Rossiter etc. Co.*, 156 Cal. 167.

If the second assignee of a *chose* in action in the form of a specialty obtains the document containing the obligation, he is preferred. *Re Gillespie*, 15 Fed. 734; *Graham Paper Co. v. Pembroke*, 124 Cal. 117 (written evidence); *Bridge v. Conn. Mut. Life Ins. Co.*, 152 Mass. 343; *Washington v. Nat. Bk.*, 147 Mich. 571; *Fisher v. Knox*, 13 Pa. 622; *Williston*, Cas. Contracts, 444n. See also Uniform Stock Transfer Act, sec. 4. If the specialty is delivered to the first assignee, he will prevail against the second assignee regardless of notice to the obligor. *Spencer v. Clarke*, 9 Ch. D. 137; *West of England Bk. v. Bachelor*, 51 L. J. Ch. 199; *Société Générale v. Walker*, 11 App. Cas. 20 (*semble*); *Kamena v. Huelbig*, 23 N. J. Eq. 78; *Maybin v. Hall*, 4 Rich. Eq. (S. C.) 105; *Strange v. Houston etc. Co.*, 53 Tex. 162. See 1 *Machen*, Corporations, sec. 885. But see *contra*, *Fraley's App.*, 76 Pa. 42; *Pratt's App.*, 77 Pa. 378.

The second assignee is preferred to the first if in good faith he obtains payment of the claim assigned, or if he reduces his claim to a judgment in his

BELKNAP *v.* BELKNAP.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1862.

5 Allen 468.

BILL IN EQUITY, praying for the removal of Edward Belknap, as trustee under the will of his father, and that an assignment by him of his interest in the trust fund might be declared void, and for other relief.

At the hearing in this court, before Hoar, J., it appeared that John Belknap died in 1856 . . . and disposed of the residue of his estate as follows:—

“All the rest and residue of my estate, real, personal, and mixed, not herein before devised and bequeathed, I hereby give, devise, and bequeath, in trust, to my sons Edward Belknap and Henry Belknap, and the survivor of them, and the heirs of such survivor, to be held in trust and managed by them for the following purposes, to wit: . . . 3. To divide the remaining income, after the payment above described, into four equal parts, for the use of my four children, Edward, Jane, Henry, and George; the parts for Edward, Henry, and Jane to be paid to them, and that of George to be paid to his mother, for his use under her direction during his minority; after he becomes of age, to be paid to himself.” Then followed provisions for the disposition of the estate after the decease of his widow, which are not now material.

By codicils to this will Edward Belknap was left the sole trustee. He accepted the trust in June, 1856, gave a bond according to law, and received a large amount of property, real and personal, and, after the settlement of his second account, absconded, having appropriated to his own use a large portion of the trust estate. On the 2d of April, 1859, being own name, or if he effects a novation with the obligor, whereby the obligation in favor of the assignor is superseded by a new one running to himself. *Judson v. Corcoran*, 17 How. (U. S.) 612; *Mercantile etc. Co. v. Corcoran*, 1 Gray (Mass.) 75; *Bridge v. Conn. Mut. Life Ins. Co.*, 152 Mass. 343; *Bentley v. Root*, 5 Paige (N. Y.) 632, 640; *New York etc. Ry. Co. v. Schuyler*, 34 N. Y. 30, 80; *Strange v. Houston Co.*, 53 Tex. 162. See *Coffman v. Liggett*, 107 Va. 418; *Pomeroy, Eq. Juris.*, sec. 698.

In *Kelly v. Selwyn*, [1905] 2 Ch. 117, it was held that if the trust *res* is in England and the *cestui que trust* made an assignment in New York (where *Dearle v. Hall* is not followed) and a later assignment in England, and notice of the second assignment was given to the trustees before notice of the first assignment, the second assignee prevails.

largely indebted to the Union Bank, in New York, for money borrowed, he executed to them an assignment . . . by which he purported to transfer "the share of the estate, both real and personal, of my late father, John Belknap, which by the terms of my said father's will can in any event vest in me, as one of his heirs or devisees, and all my right, title, and interest therein, including any accumulations made, or hereafter to be made of the income of said estate." This assignment was made as additional collateral security, the bank not being satisfied with what they then had. The greater part of that indebtedness is still unpaid. It did not appear whether he was a defaulter to his father's estate at the time of executing the assignment; but it did appear that the officers of the bank had no knowledge or reason to believe that no [a?] default or misapplication of the funds held under the will had then been made.

As against Edward Belknap, the bill was taken for confessed; and the Union Bank alone opposed the granting of the relief sought for. A receiver was appointed to take charge of the estate, pending the suit; and it appeared by his accounts that the share of the income, and the commissions, to which Edward might have been entitled, if he had not been a defaulter, had been reserved. It was contended, in behalf of Henry Belknap, that this share of the income and the commissions ought to be applied to make up the amount of the principal which has been misapplied by Edward; and other parties contended that the same should be applied first to make up the deficiency in the income.

The case was reserved for the determination of the whole court.

HOAR, J. We shall have no occasion to decide the question which has been argued in this case, whether the assignment by Edward Belknap to the Union Bank was of any validity whatever; because it is very clear, upon principle and authority, that the estate in the hands of the trustee is bound in equity to discharge the legacies to the other *cestuis que trust*, before he or his assigns can claim any part of it, if the estate has been diminished by a violation of his duties as trustee. The equities of those to whom he is bound by his assumption of the trust are prior and superior to any which he can create in the trust fund by contract. As it was held in *Fuller v. Knight*, 6 Beav. 205, a trustee cannot bargain away his power to make good a deficiency in the trust fund, arising from his breach of trust.

The doctrine is very succinctly stated in *Morris v. Livie*, 1 Y. &

Coll. 380, of which the marginal note is as follows: "If an executor assigns his reversionary legacy, the assignee takes it subject to the equities which attached to the executor; and therefore if the latter, though subsequently to the assignment, wastes the testator's assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust."

That case was very elaborately argued and carefully considered, and seems more directly in point than any other which has been cited. Though not binding upon this court as an authority, we are satisfied that it rests upon sound principles of equity.

A distinction has been strongly pressed by the counsel for the Union Bank, supposed to arise from our statute provisions which require security to be given by executors and trustees for the faithful performance of their trusts. But it is difficult to see any equity which the assignee of a trust fund which is to remain in the hands and under the management of the assignor can have against the sureties on his official bond. The assignor certainly has no claim on the surety to make good to him any loss by his own unfaithfulness. If there were no assignment, equity would obviously require the trustee to pay everything due to others beneficially interested in the fund, if the fund were diminished by his dishonesty, before applying any further part of it to his own use. And there seems to be no good reason why the assignee should be put in a better condition than the assignor. It would be in effect to allow the assignor to take to his own use his share of the trust fund, and by contract with a third party to cast upon his official surety the burden of making it good to a purchaser.

The Union Bank, when they took the assignment, knew that it was of a fund held by Edward Belknap in trust, and which was to continue under his care and management. They took it subject to all the risks of such a condition of things; subject to all equities in favor of the other *cestuis que trust*, arising from the fact that the assignor was trustee; and they acquired no equitable rights against the sureties in the probate bond, because their grantor had none which he could convey.

It does not appear that the defalcation by Edward Belknap is equal to the share of the estate of which he is entitled to the income. If it is not, it is equally for the interest of the bank, and of those who may be entitled to the reversionary interest, if he should not survive his mother, that his share of the income should be applied to make good the capital.

The decree will therefore be, that the assignment shall have no force or effect against any persons beneficially interested in the estate, other than Edward Belknap.

The commissions which have been retained as belonging to Edward Belknap are to be applied first to the payment of the charges and expenses of the receiver. If there is any part remaining, it is next to be applied to the costs of the suit; and the remainder, if any, is to be distributed as income.

The income belonging to Edward Belknap must be applied to make good the deficiency in the trust fund which he has caused. He must be removed from the trust, and a new trustee appointed, and the case sent to a master to take an account; and all other questions, including that of the ultimate rights of the Union Bank under the assignment, except so far as already determined, be reserved.¹

¹ *Wilkins v. Sibley*, 4 Giff. 442; *Re Knapman*, 18 Ch. D. 300 (*semble*); *Doering v. Doering*, 42 Ch. D. 203 (subsequently acquired interest); *American Surety Co. v. Vinton*, 224 Mass. 337; *Jenkinson v. N. Y. Finance Co.*, 79 N. J. Eq. 247, 254 (*semble*); *Hart's Estate* (No. 5), 203 Pa. 503 (*semble*), *accord*. *Wilkes v. Harper*, 2 Barb. Ch. 338, 355, 1 N. Y. 586, *contra*. See also *Re Sewell*, [1909] 1 Ch. 806; *Re Rhodesia Goldfields*, [1910] 1 Ch. 239 (breach before assignment); *Re Towndrow*, [1911] 1 Ch. 662; *Re Dacre*, [1916] 1 Ch. 344, *aff'g s. c.*, [1915] 2 Ch. 480; *Cogswell v. Weston*, 228 Mass. 219; *Raynes v. Raynes*, 54 N. H. 201. *Cf. Re Pain*, [1919] 1 Ch. 38.

CHAPTER VII.
THE PERSONS WHO ARE BOUND BY A TRUST.

NOTE.

———. 1453.

Fitzh. Abr. Subpoena, pl. 19.¹

IF I enfeoff a man to perform my last will and he enfeoffs another, I cannot have a subpoena against the second because he is a stranger, but I shall have a subpoena against my feoffee and recover in damages for the value of the land. Per *Yelverton* and *Wilby*, clerks of the rolls, who said that if my feoffee in confidence enfeoffed another upon confidence of the same land, that I should have a subpoena against the second,² but otherwise when he was enfeoffed *bona fide*, for then I am without remedy, and so it was adjudged in the case of the Cardinal Winchester.

ANONYMOUS.

———. 1465.

Y. B. 5 Ed. IV. fol. 7, pl. 16.³

IF J. enfeoffed A. to his use and A. enfeoffed R., although he sold the land to him; if A. gave notice to R. of the intent of the first use, he is bound by writ of subpoena to perform the will, &c.⁴

¹ Crompton, Courts, 54, s. c.

² An unauthorized conveyance by a trustee is a breach of trust. Anon., 3 Swanst. 79n. (a).

³ Fitzh. Abr. Subpoena, pl. 2; Crompton, Courts, 59, s. c.

⁴ "Note by the Chancellor [Cardinal Morton], if the feoffee in confidence enfeoffs another who knows of the confidence, the feoffor may have subpoena against the latter feoffee and recover the land against him; but if he does not know of the confidence, it is otherwise." Anon., Fitzh. Abr. Subpoena, pl. 18 (1492).

"If the feoffee sell the land for good consideration to one that hath notice, the purchaser shall stand seized to the ancient use; and the reason is, because the chancery looketh farther than the common law, namely, to the corrupt conscience of him that will deal in the land, knowing it in equity to be another's." Bacon, Uses, 15 (*cir.* 1600).

In several states it is provided that where a trust in relation to real property

ANONYMOUS.

———. 1468.

8 Ed. IV. fol. 6, pl. 1.¹

AND it was moved whether a subpoena would lie against an executor or heir. And CHOKER, J., said that he had formerly sued a subpoena against the heir of a feoffee, and the matter was long debated. And the opinion of the Chancellor and the justices was that it did not lie against an heir, and so he sued a bill to Parliament.

FAIRFAX. This matter is a good store for discussion when the others come, &c.

ANONYMOUS.

———. 1474.

Fitzh. Abr. Subpoena, pl. 14.

NOTE, that a subpoena lies against the heir of the feoffee who survives. Mich. 14. E. 4.²

is expressed in the instrument creating the estate, every transfer or other act of the trustee in contravention of the trust, is absolutely void. Cal. Civ. Code, sec. 870; Burns' Ind. Stat., 1914, sec. 4016; Kan. Gen. St., 1915, sec. 11678; Mich. Comp. L., 1915, sec. 11585; Mont. Rev. Codes, 1907, sec. 4549; N. Dak. Comp. L., sec. 5379; Okla. R. L., 1910, sec. 6074; S. Dak. Civ. Code, sec. 317; Wis. Stat., 1915, sec. 2091.

¹ [Fitzh. Abr. Subpoena, pl. 8, Crompton, Courts, 46], Ellesmere, Office of Chancellor, 86, pl. 26, s. c., to which report the author adds: "Note that it must be intended that the heir had not this land, but that the land was sold before by the feoffee to a stranger; for if the heir had the land, he is liable to the trust as well as the feoffee." See also Cary, 10, 12; Ellesmere, Office of Chancellor, 94, pl. 49. — AMES.

² "THE Chancellor said that it is the common course in the chancery to grant [subpoena?] against an obligation and so upon a feoffment in trust when the heir of the feoffee is in by descent or otherwise, for we find records of this in the chancery. HUSE, C. J. When I first came to court, thirty years ago, it was agreed in a case by all the court that if a man had enfeoffed another in trust, if the latter died seised so that his heir was in descent, that then no subpoena would lie; and there is great reason why this should be so, for if by means of a subpoena you may disprove a descent by two proofs in chancery, you may disprove twenty descents, which is contrary to reason and conscience. And therefore it seems to me less of an evil to make him who suffers his feoffee to die seised of his land, lose it, than to disinherit several by proofs in the chancery. . . . To which the Chancellor said, then it is great folly to enfeoff others of my land." Y. B. 22 Ed. IV. fol. 6, pl. 18 (1482).

"Vavasour, J., said that the subpoena commenced in the time of Ed-

MORTIMER *v.* IRELAND.

CHANCERY. 1847.

11 Jur. 721.

ONE T. B. Mortimer by his will named T. Griffiths and E. Pruen (without mentioning their heirs or executors) as his executors and trustees. Griffiths died without having proved the will or acted in the trusts. Pruen proved the will and acted and later died, leaving a will in which R. Ireland and H. Pruen were named executors, and a codicil whereby he devised and bequeathed the trust property to Ireland to hold on the trusts of the Mortimer will. A bill was filed by persons interested under the will of T. B. Mortimer to determine whether Ireland had been duly appointed trustee and, if not, to appoint a new trustee and to direct a conveyance by Ireland to such trustee. The Vice-Chancellor referred it to a Master to appoint two trustees. Ireland appealed.¹

LORD CHANCELLOR [COTTENHAM]. The argument amounts to this, that the executor of a trustee is of right a trustee. Whether the property is real or personal estate is no matter, for suppose a man appoints a trustee of real and personal estate *simpliciter*, adding nothing more, this cannot make his representative a trustee. The case before the Master of the Rolls [Titley *v.* Wolstenholme, 7 Beav. 425] was quite different, for there the court proceeded on the intention manifested,

ward III. [1326-1377], but this was always against the feoffee upon confidence himself, for against his heir the subpoena was never allowed until the time of Henry VI. [1422-1461], and in this point the law was changed by Fortescue, C. J." Keil. 42, pl. 7 (1501).

"If he [the feoffee to uses] makes a feoffment over, the feoffor [i.e. the *cestui que use*] has no remedy against the feoffee; the same law if he dies, the heir of the feoffee is seised as I think to his own use, for the confidence which the feoffor put in the person of his feoffee cannot descend to his heir nor pass to the feoffee of the feoffee, but the latter is feoffee to his own use as the law was taken until the time of H. IV. [E. IV? or H. VI?]. But if the second feoffee has notice of the use, they in the chancery will reform this by *subpœna* at this day; and the heir of the feoffee upon confidence was seised to his own use until the commencement of E. IV., and then the *subpœna* began against the heir and against the feoffee of the feoffee." Anon., Keil. 46b, pl. 7 (1502).

"THE heir is not in equitie bound to assure lands which his father bargained and tooke money for." *Weston v. Danvers*, Toth. 105 (1584).

See Bacon, *Uses*, Rowe's ed., 23, n. 39.

¹ The statement of facts is abridged.

that the trust should be performed by the assigns of the survivor. The property may vest in the representative, but that is quite another question from his being trustee. The testator may select the heir to succeed to the trust, but he only can do so. Here there are two persons appointed trustees; both die; thus there is no trustee, and it is for the court to appoint new ones. The testator having given no indication of intention, the court must refer it to the Master. The decree of the Vice-Chancellor is right in its form. The appeal must be dismissed with costs.¹

¹ If there are several trustees and one of them dies, the legal title survives to the others who may continue to administer the trust. *Doily v. Sherratt*, 2 Eq. Cas. Abr. 742. The court will add new trustees to replace those who died if it was the intention of the creator of the trust that the number should be kept up or if it appears to the court that such a course will be conducive to the benefit of the trust. *Perry*, Trusts, sec. 286.

At common law a sole trustee has power on his death to devise or bequeath the legal title to the trust property. Whether the devisee or legatee may administer the trust depends upon the intention of the creator of the trust. See *Cook v. Crawford*, 13 Sim. 91; *Titley v. Wolstenholme*, 7 Beav. 425; *Osborne to Rowlett*, 13 Ch. D. 774; *Lewin*, Trusts, 255. On the question how far trust property is included in a general devise by a trustee, see *Ames*, 316; *Lewin*, Trusts, 255.

At common law on the death of a sole trustee the legal title to land held in trust and not devised passes to his heir and the legal title to personalty held in trust and not bequeathed passes to his personal representatives. Whether the heir or personal representative of the trustee may administer the trust depends upon the intention of the creator of the trust. *Mortimer v. Ireland*, 11 Jur. 721, 6 Hare 196; *Re Morton*, 15 Ch. D. 143; *Re Pixton*, 46 W. R. 187; *Re Waidanis*, [1908] 1 Ch. 123; *Re Crunden*, [1909] 1 Ch. 690; *Re Ingleby etc. Co.*, 13 L. R. Ir. 326; *State v. Miss. Valley T. Co.*, 209 Mo. 472; *Woodruff v. Woodruff*, 44 N. J. Eq. 349; 2 *Woerner*, Law of Administration, secs. 321 (executor of trustee), 350 (executor of executor); *Ames*, 510n.

In a few states the law of primogeniture determines who shall, as heir of the trustee, take the legal title to land held in trust. *St. Stephen's Church v. Pierce*, 8 Del. Ch. 179; *Boston Franklinite Co. v. Condit*, 19 N. J. Eq. 394; *Cone v. Cone*, 61 S. C. 512.

By the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), sec. 30, it was provided that on the death of the trustee, real estate held in trust should, notwithstanding any testamentary disposition, vest in the personal representatives or representative from time to time of the trustee who should be deemed his heirs and assigns within the meaning of all trusts and powers. See *Lewin*, Trusts, 246; *Godefroi*, Trusts, chap. 3.

In the United States it is frequently provided by statute that the title to trust property shall be in abeyance or vest in the court until a new trustee is appointed by the court, and that when such trustee is appointed title shall immediately vest in him. See *Perry* Trusts, secs. 269, 341.

ANONYMOUS.

COMMON PLEAS. 1522.

Y. B. 14 Hen. VIII. fol. 4, pl. 5.

ONE J. S. brought replevin for cattle tortiously taken. The defendant avowed that the feoffees of the land where, etc., granted a rent charge, with clause of distress, to one Alice, who later married the defendant. The plaintiff replied that the feoffees were seised to the use of one W. N., that Alice had notice of the use, and that subsequently the feoffees enfeoffed one H., to whom W. N., the *cestui que use*, released his rights. The defendant demurred. The question was whether the rent should be to the use of W. N. or to the grantee's own use, for if to the use of W. N. his release would extinguish the rent charge by statute 1 Rich. III, c. 1, which makes the release of the *cestui que use* effectual at law.¹

FITZ HERBERT, J. . . . If I enfeoff B. to hold to him his heirs and assigns, my trust and confidence are in him, his heirs and assigns: and this is easily shown, for the heirs will be bound to perform the feoffor's will as much as the father, and the second feoffee as much as the first, if there is no consideration, and so it is if the feoffee suffer a recovery without a consideration. For it shall be intended since he parted with the land without consideration that he parted with it in the most proper way, i.e. to hold it as he held. For when an act rests in intendment and is indifferent, the law makes the most favorable presumption, for if I see a priest and a woman together suspiciously, still as long as there is doubt whether he is doing good or evil the former is to be presumed, . . . and so here when he makes a feoffment or grant without any consideration. . . . And, sir, the rent is, in a manner, part of the land, . . . and here the trust was in the land out of which the rent was granted, and this grant is without consideration, and it may be granted to the first use, wherefore it shall be so intended. And although the rent was not *in esse* and he had no use in it before, still he may have the use. . . .

BROKE, J., to the same intent. . . . Sir, as the feoffor puts confidence and trust, so shall be his use, and the use is in the feoffor in conscience although the feoffee has the land by the common law. . . . Every dealing with the land should be

¹ The statement of facts is abridged, and parts of the opinions are omitted. See Bro. Abr. Feff. al Uses, fol. 338, pl. 10, s. c.

according to the wish of the feoffor. For if the feoffee acts otherwise, he is chargeable in conscience, and so is the heir of the feoffee, . . . and the feoffee of the feoffee, if there is no consideration; and so is he who comes in by fine and false recovery, *scil.* those recoveries in a writ of entry in the *post*. For in all these cases it is the act of the feoffee, and being without consideration the law intends that it was according to the first use; and, sir, conscience does not make the use, but common reason, which is common law, which is indifferent to all laws spiritual and temporal; and, sir, although common reason says that if I enfeoff one without consideration, this shall be to my use, still this land shall be in the feoffee like any other land and take the same course: for if he has a wife and dies, his wife shall have dower to her own use, for here there is no act of the feoffee and she does not claim by the feoffee, but the law makes her estate; and so if he is bound in a statute merchant; and so in case of a lord taking by escheat, for in these cases there was no act by the feoffee to deceive or defraud the feoffor, but it was done by order of the law. And, sir, the notice, as here, is the important matter, for if there was no notice there would be no use, but if he has notice, he is *particeps criminis*. . . .

POLLARD, J., to the same intent. As has been said uses were at the common law and are nothing more than confidence and trust, and the feoffee is bound to act according to the trust, otherwise he would deceive his feoffor, which would not be reason. And there is a diversity when there is a default in the feoffee in deceiving the feoffor, and when not, for if the feoffee die his wife shall have dower, and hold to her own use, and so in case of a statute merchant or escheat, for there is no default in feoffee, but the operation of law. But the default is in me, and although my feoffee is bound in a statute merchant, still I can enter and make a feoffment and the execution is discharged. And so if my feoffee endowed his wife *ad ostium ecclesie* and I re-enter, it is void, for the feoffee took the estate by my feoffment, and not by law. . . . And if the feoffees enfeoff one without consideration, it is to the first use unless it be without notice; but if upon consideration without notice the use is changed, and if with notice, though upon consideration, the first use remains; and this is the diversity.¹ . . .

¹ It has been settled since the decision in the principal case that a donee of property subject to a use or trust takes subject to the use or trust. *Otis v. Otis*, 167 Mass. 245.

It is sometimes said that the reason is that the donee is presumed to have

COMPLEAT ATTORNEY, ed. 1656, 310. — And the tenant in dower, and by curtesie, should not be seised to uses in being, for all these wanted privity of estate.¹

NOEL *v.* JEVON.

CHANCERY. 1678.

Freem. C. C. 43.

THE bill was to be relieved against the defendant's dower, her husband being only a trustee; and it appearing that the husband was but a trustee, the defendant was barred of her dower, contrary to the opinion of *Nash v. Preston*, Cro. Car. 191; and so it was said is the constant practice of the court now.²

STEPHENS *v.* BAILY.

CHANCERY. 1665.

Nels. 106.

LESSEE for another man's life contracts with the plaintiff for a sum of money to convey an estate to him, but dies before the conveyance was perfected.

notice of the use or trust. *Compleat Attorney*, 309, 310; *Langdell, Summary Eq. Pl.*, 211. But if an innocent donee of a fractional interest in trust property subsequently purchases in good faith and for value another fractional interest, he takes the latter interest clear of the trust. *Giddings v. Eastman*, 5 Paige (N. Y.) 561. For a discussion of the reasons for binding a donee, see *Ames, Lect. Leg. Hist.* 255; 17 *Col. L. Rev.* 283; *ibid.*, 479.

It is unnecessary to cite cases for the proposition which was stated by the judges in the principal case and from which the courts have never deviated, that a purchaser from a feoffee to uses or trustee who takes the legal title for value and without notice of the uses or trusts, takes it free and clear of the uses or trusts. See *Ames*, 286n.

¹ See *Y. B. 14 Hen. VIII.* fol. 4, pl. 5, *ante* p. 632; *Bro. Abr. Feff. al Uses*, pl. 40; *Chudleigh's Case*, 1 Rep. 114, 122a; *Lewin, Trusts*, [12 ed., 2, 246, 276.] — *AMES*.

² See *Ames*, 374; *Gilbert, Uses*, 18; *Lewin, Trusts*, 246, 276; *Perry, Trusts*, sec. 322.

A wife has no homestead interest in land held by her husband as trustee. *Osborn v. Strachan*, 32 Kan. 52.

A husband is not entitled, in equity at any rate, to curtesy in lands of which his wife is seised merely as trustee. *Bennet v. Davis*, 2 P. Wms. 316; *King v. Bushnell*, 121 Ill. 656; *Chew v. Commissioners*, 5 Rawle (Pa.) 160. See also *Welch v. Chandler*, 13 B. Mon. (Ky.) 420; *Perry, Trusts*, sec. 322.

The defendant, being the heir of the lessee *pur autre vie*, enters, and holds the land as special occupant; and a bill being brought against him to perfect the assurance, he demurred to it, and it was insisted for him that he was in possession as an occupant, and so was not privy to his father who made the contract.

Maynard, on the other side, argued, that an occupant is liable to an action of waste, and that was the Dean of Worcester's case; and that an occupant was bound by this agreement in equity: that the plaintiff, who was out of his money, ought to have relief: that where a man contracts for the purchase of lands, and dies before the assurance is executed, the heir of the vendor stands trusted for the purchaser, and is compellable in this court to execute the estate to him, and that trusts here are of another nature than uses are at common law: that a covenant doth not bind an occupant at law, because the estate which he possesseth by the occupancy is not assets in law: but here it is a trust: that if a copyholder takes money, and covenants to convey, his heir is not bound at law, yet this court will compel him.

So in this case, the lands are bound by the agreement in whose hands soever they fall.

Mr. Finch, for the defendant, insisted that this was not like the case of a copyholder; for the lord is bound to admit the heir, and then he is in by descent, and he may have an ejectment before admittance; 'tis more like the case of one seised in fee, who contracts to sell, and dies before any assurance, and without heir, so that his lands escheat to the lord: this court will not compel that lord to convey to the vendee. But *Maynard* said, the reason was, because by such conveyance the lord would lose his ancient services which were due before the lands escheated.

To which it was replied, that this did not seem to be a tolerable reason, because the lord might make such a conveyance reserving the ancient services. But it being referred to Justice TYRRELL, he certified, that, having advised with the judges, he was of opinion that the defendant ought to answer; and so it was ordered.¹

¹ *Gell v. Vermedun*, Freem. C. C. 199 (*semble*), *accord.* *Anon.*, Freem. C. C. 155, *contra*.

An occupant seems not to have been bound by a use. Bro. Abr. Feff. al Uses, fol. 338, pl. 10.

ANONYMOUS.

— 1580.

6 Jenk. Cent. pl. 30.

AT this day, where the tenant of the land is attainted of felony or treason, the use and trust for this land are extinguished; for the king, or the lord to whom the escheat belongs, comes in in the *post* and paramount the trust; and upon a title elder than the use or trust, *viz.* the right of his lordship by escheat for want of a tenant.¹

¹ *Uses.* The lord taking by escheat on the death of a feoffee to uses without heirs was not bound by the use. Y. B. 14 Hen. VIII. f. 4, pl. 5; Y. B. 14 Hen. VIII. f. 24, pl. 2; Bro. Abr. Feff. al Uses, pl. 40; Chudleigh's Case, 1 Rep. 122a, 139b; [Compleat Attorney, 310. But see Duke, Char. Uses, 161.]

In Chudleigh's Case, 1 Rep. 114, Popham, C. J., said (p. 139b): "The reason why the lord by escheat, or the lord of a villain, should not stand seised to an use, is, because the title of the lord is by reason of his elder title, and that grows, either by reason of the seigniorship of the land, or of the villain, which title is higher and elder than the use or confidence is; and therefore should not be subject to it."

Trusts of Land. The lord taking by escheat was not at common law bound by a trust. Ellesmere, Office of Chancellor, f. 93, pl. 48; Peachy v. Somerset, 1 Stra. 447, 454; Burgess v. Wheate, 1 Ed. 177, 201, 246 (*semble*); King v. Mildmay, 5 B. & Ad. 254; Atty. Gen. v. Leeds, 2 M. & K. 343; Benzein v. Lenoir, 1 Dev. Eq. 225; King v. Rhew, 108 N. C. 696, 700. See also Reeve v. Atty. Gen., 2 Atk. 223. [And see Hardman, Law of Escheat, 4 L. Quar. Rev. 318, 329.]

The notion that the lord taking by escheat is bound by a trust is countenanced only by the dissenting opinion of Lord Mansfield in Burgess v. Wheate, 1 Ed. 177, 229 (the reasoning in which is fully answered in Lewin, Trusts, 12 ed., 277), by an alleged but improbable dictum of Lord Bridgman in Geary v. Bearcroft, Cart. 57, 67 (see 1 Hargrave's Juris. Exer. 383, 391), and by loose dicta in Eales v. England, Prec. Ch. 200, and White v. Baylor, 10 Ir. Eq. R. 43, 54.

By Intestates Estates Act, 1884 (47 & 48 Vict. c. 71) sec. 6 (following the earlier acts [4 & 5 Will. IV, c. 23], 39 & 40 Geo. III. c. 88, sec. 12, and 13 & 14 Vict. c. 60, secs. 15, 46), the right of the *cestui que trust* is saved, although the legal title escheats by the failure of heirs of the trustee. See *Re Martinez's Trusts*, W. N. (1870), 70. — AMES.

As to the distinction between escheat and forfeiture, see Challis, Real Property, 3 ed., 37. See Pawlett v. Attorney General, Hard. 465 (equity of redemption); Pimbe's Case, Moore 196, *ante* p. 238.

Personalty. On the death of a trustee of personalty, intestate and without next of kin, the Crown at common law took the legal title to the trust property as *bona vacantia*. And on the attainder of the trustee of personalty for felony

SAUNDERS v. BOURNFORD, ALLEN *et al.*

CHANCERY. 1679.

Finch 424.

JOHN ALLEN being seised in fee, etc., did, by indenture dated 25 April 10 Jac. grant the lands in the bill, etc., to Richard Saunders; and in the said deed there was a covenant for farther assurance.

This grant being only of a term of one thousand years, Richard Saunders, upon the marriage of his son John with one Anne Andrews, assigned the residue of the said term to his son John, who quietly enjoyed the same for thirty-five years.

John Saunders on the 20th of August, 1662, assigned the remainder of the term to Thomas Harris and John Allen the grandson of the first lessor, in trust for the benefit of his wife and children; and the trustees accepted the said trust, and declared it to be for Anne the wife of John Saunders, and for the education and for raising portions for her younger children; and after her decease, in trust for Edward her eldest son, and that on request they would assign the same to him; and the premises were enjoyed accordingly.

Edward, in the year 1668, devised the residue of the said term to Margaret his wife, who, on 23 July 19 Car. 2. sold it to the plaintiff Nicholas Saunders for a valuable consideration; and Thomas Harris, who was the surviving trustee of John Saunders, and the children of the said John, all joined in said sale; and the plaintiff enjoyed the premises quietly for many years.

Afterwards the defendant Isabella Allen claimed a title as heir at law to John Allen the original lessor, (*viz.*) as daughter or treason, the Crown likewise took the legal title to the trust property. It seems however that in both these cases the Crown took subject to the trust. *Hix v. Attorney General*, Hard. 176. But since no bill in equity lies against the sovereign, relief is given only upon petition. Ames, 215. As to the practice on petitions of right, see 144 L. T. 170.

It is now however provided by statute that the Crown shall not take, but a new trustee shall be appointed by the court. 4 & 5 Will. IV. c. 23.

In the United States there is of course no attainder of treason or felony. In those jurisdictions in which on the death of the trustee the trust property vests in new trustees appointed by the court, the fact that the trustee dies intestate and without heirs or next of kin is of course immaterial. When trust property does vest in the state, relief can be obtained only by act of the legislature. See *Briggs v. Light-Boats*, 11 Allen (Mass.) 157. See also N. J. Sess. Laws, 1912, c. 230.

and heir to Thomas Allen, who was son and heir of John Allen, who was son and heir of the said John who granted the original lease; and the other defendant Richard Bourn claimed as administrator *de bonis non*, etc., of the said Thomas Allen and John Allen his son.

The title of the said Isabella was that a moiety of the said term was merged in the inheritance; for that John Saunders, 20 August 1662, assigned the whole to Thomas Harris and John Allen, who was then heir at law to the reversion in fee, and grandfather of the said Isabella; so that a moiety of the said term was merged in him, and his granddaughter Isabella hath recovered the said moiety in ejectment, and hath now possession thereof; for which reason the plaintiff hath exhibited his bill against the defendants to have one moiety of the term confirmed to him, which is now claimed by the administrator *de bonis non*, etc., and that Isabella may make a new grant of the other moiety, which was merged as aforesaid.

THE COURT decreed, that the plaintiff should hold the premises, during the remainder of the term, notwithstanding the merger of the moiety; and that the defendant Isabella make a farther assurance of the remainder of the said term, etc.¹

¹ In *Re Albert Road*, [1916] 1 Ch. 289, a corporation which was, in effect, trustee of a leasehold interest, was dissolved, with the result that the lease terminated. It was held that the interest of the *cestui que trust* was not destroyed by merger, but that the reversioner became trustee to the extent of the term, and the court appointed a new trustee and made a vesting order. See also *Gilbert, Uses*, 16. See *Thorn v. Newman*, 3 Swanst. 603; 3 *Preston, Conveyancing*, 3 ed., 314-327. The result is different if the reversioner is a purchaser of the term for value and without notice. *Wilkes v. Spooner*, [1911] 2 K. B. 473.

"If a lease be made to a charitable use, and the lessee commits a forfeiture by feoffment etc., if the lessor enter for the forfeiture, he shall be bound by decree, during the years to come of that lease." *Duke, Char. Uses*, 161 (1676).

Similarly, equity will give relief when a remainderman by fraud induces the tenant for years to surrender his term. *Danby v. Danby*, *Finch* 220.

Equity protects the trustee as well as the *cestui que trust*, as, for example, where an estate of the trustee held in his own right, is merged in an estate held in trust. 3 *Preston, Conveyancing*, 3 ed., 326.

LORD COMPTON'S CASE.

COMMON BENCH. 1580.

3 Leon. 196.¹

NOTE, it was holden by Lord ANDERSON, C. J., in this case, that if *cestui que use* after the Statute 1 Rich. III. leaseth for years, and afterwards the feoffees release to the lessee and his heirs, having notice of the use; that that release is to the first use. But where the feoffees are disseised and they release to the disseisor, although that they [he?] have notice of the use, yet the same is to the use of the disseisor; and no subpœna lieth against the disseisor.²

¹ 2 Leon. 211 s. c.

² See Chudleigh's Case, 1 Rep. 114, 120a; Earl of Worcester v. Finch, 4 Coke Inst. 85; Turner v. Buck, 22 Vin. Abr. 21, pl. 5; Colburn v. Broughton, 9 Ala. 351 (converter of chattel); Ames, 372n.; 17 Col. L. Rev. 284-287; *ibid.* 478-479.

"The reason why a disseisor should not stand seised to an use was, because *cestui que use* had no remedy by the common law for any use, but his remedy was only in chancery; and because the right of a freehold or inheritance could not be determined in chancery, his title should not be drawn into examination there; and for this reason a disseisor shall not be compelled in the chancery to execute an estate to *cestui que use*, but *cestui que use* shall compel his feoffees in the Court of Chancery to enter upon the disseisor, or to recover the land against him at the common law: and then the chancery will compel the feoffees to execute the estate according to the use." Chudleigh's Case, 1 Rep. 114, 139b.

"And if a disseisor, abator, or intruder, had come to the possession of the land, whereof the use was, albeit he had notice of the use, yet the use was suspended during their possession, and they should not have been seised to the use as the feoffee was, for they come not to the land in the *per* but in the *post*." Compleat Attorney, 310.

"The disseisee doth release unto the disseisor rendering rent, the render is void, for a rent cannot issue out of a right; so an use cannot be out of a release by the disseisee, for such release to such purpose shall not enure as an entry and feoffment." Read v. Nash, 1 Leon. 147, 148.

"Release of right *in rem* to disseisor extinguishes it — use grafted on right *in rem* disappears also. Today disseisor would be made constructive trustee. But lessee for years had no seisin; therefore grantee of seisin with notice of use took subject to it." Ames, MS. note to Lord Compton's Case.

ANONYMOUS.

CHANCERY. 1680.

Freem. C. C. 52.

OBLIGEE makes the obligor executor in trust for his children, etc. Though this be in law an extinguishment of the debt, yet in equity it is not, but it shall be preserved in being for the benefit of the *cestui que trust*.

PARKER v. TENANT.

QUEEN'S BENCH. 1561.

Jenk. Cent. 221, pl. 75.

A. MAKES an obligation to B. to the use of C. A. seals it; A., B., and C. being at the time of sealing it at one place; A. puts the obligation into the hands of C. and says: This will serve. This is a good delivery; and tho' C. afterwards marries A. yet the obligation remains, and is neither extinguished nor suspended.

*Adjudged and affirmed in Error.*¹

the court held that the owner of an estate of inheritance subject to an outstanding term given to trustees upon a trust for purposes not yet accomplished might bring ejectment. The principal opinion was delivered by Lord Mansfield. It has long since been overruled. See *Doe v. Staple*, 2 T. R. 684; *Lewin, Trusts*, 871; *Ames*, 254n. In Pennsylvania where there was formerly no equity jurisdiction, the *cestui que trust* may maintain ejectment against a stranger. *Kennedy v. Fury*, 1 Dall. 72; *Brolaskey v. McClain*, 61 Pa. 146.

Nor can the *cestui que trust* merely as such maintain an action of trespass *quare clausum fregit* or case or any other action at law. But see *Yates v. Big Sandy Ry. Co.* (Ky., 1905), 89 S. W. 108, criticized 19 Harv. L. Rev. 307. But if he was in possession he may, like any other possessor, maintain the possessory actions. *Stearns v. Palmer*, 10 Met. (Mass.) 32.

Similarly a *cestui que trust* of personalty not in possession cannot maintain an action at law against a stranger to recover possession of or damages for an injury to the trust property.

Suit in Equity. If the trustee refuses to bring an action against a third person who has taken possession of or injured the trust property, the *cestui que trust* may bring a suit in equity joining the trustee and the third person as defendants. See Chap. I, sec. VIII, *ante*.

¹ *Cotton v. Cotton*, 2 Vern. 290, *accord*.

ANONYMOUS.

COMMON BENCH. 1562.

Dalison 38, pl. 6.

IN debt upon an obligation Carns, for the defendant, said that whereas he was indebted to one A., brother of the plaintiff, in the sum demanded, A. appointed the plaintiff to be his factor, and to receive an obligation to his use, and the defendant sealed this obligation to the plaintiff to the said use, after which the said A. released to the defendant all actions, suits, and demands. It was held by all the Judges that this was no plea, for the obligation was made to the plaintiff, and A. had nothing to do with the action, so that it is no more than the release of a stranger;¹ and if the plaintiff himself had made the release, this would have been a bar. The use here did not appear in the obligation. T. 36 H. VIII. Broke, Obligation, 72 &c., Mes. notes, 284.

GIBSON v. WINTER AND ANOTHER.

KING'S BENCH. 1833.

2 L. J. K. B. 130.

DENMAN, C. J.² — This was an action on a policy of insurance under seal, in which policy the plaintiff was described to be interested in the subject matter, or duly authorized as owner or agent, or otherwise, and it contained a covenant of the defendants with him, which amounted to an insurance on goods, the property of Le Quesne, of Jersey, who employed the plaintiff and his partner Poingdestre, insurance brokers and commercial

¹ *Offly v. Warde*, 1 Lev. 235; *Scholey v. Mearns*, 7 East 147; *Stevenson v. Rogers*, 2 Hill (S. C.) 291; *Tuttle v. Catlin*, 1 D. Chip. 366, *accord*.

But a release by the *cestui que trust* having the entire beneficial interest would be effectual in equity. *Pratt v. Dow*, 56 Me. 81; *McBride v. Wright*, 46 Mich. 265; *Galt v. Smith*, 145 Pa. 167; *Stevenson v. Rogers*, 2 Hill (S. C.) 291 (*semble*); *Smith v. Brown*, 5 Rich. Eq. 291. [See also *Supreme Lodge v. Rutzler*, 87 N. J. Eq. 342, *ante* p. 103.] So the dismissal by the *cestui que trust* of an appeal taken by the trustee is effective. *Ratliff v. Patton*, 37 W. Va. 197. — AMES.

Set-off. If the obligee-trustee sues the obligor, the latter may not at common law set off a debt due to him from the *cestui que trust*. But such set-off is allowed in equity or by way of equitable defense. *Ames*, 270n.

² Only the opinion of the court is here given.

agents, in London, to effect this policy. A loss accrued, and in July, 1829, a partial adjustment of the loss to the amount of 3,000*l.* took place between the plaintiff and defendants. The defendants gave credit to the plaintiff for 1,524*l.* 9*s.*, due from the plaintiff to them for premiums of insurance on ships, and property of other persons as part payment of this sum, and paid the balance of 1,475*l.* 11*s.* to the plaintiff. In September the plaintiff became a bankrupt, not having paid to Le Quesne the amount received by him and allowed in account, and this action was brought by Le Quesne in the name of the plaintiff to recover from the defendants the sum of 1,524*l.* 9*s.*, on the ground that the plaintiff was authorized to account for the loss in money only, and that a payment in any other way was not binding upon his principal. There were several pleas, and amongst the rest, a plea of payment, upon which the question arose. At the trial, before Lord Tenterden, at the Sittings after Trinity term, the defendants had a verdict on the ground that Le Quesne had acquiesced in, and adopted the mode of payment pursued by the plaintiff, and was bound by it. If it had depended on the propriety of the verdict, we should have thought it right to submit the case to the consideration of another jury, for we are by no means satisfied that the evidence proved acquiescence and adoption by Le Quesne, as he was never correctly informed of the real state of the facts. It was insisted by the counsel for the defendants, that the evidence proved a general agency in Poingdestre and Gibson, and, therefore, their acts bound Le Quesne; but we are of opinion the verdict cannot be supported on that ground, as their general agency was not proved, and, indeed, was negatived upon the trial. The last objection is, that as the covenant was with Gibson, and he alone could sue upon it, payment to him in any mode by which he was bound, would be a good payment against Le Quesne, and as the settlement with the plaintiff bound him, it equally bound Le Quesne suing in his name; and, upon full consideration, we are of opinion that this objection is valid. The plaintiff, though he sues as trustee of another, must, in a court of law, be treated in all respects as the party upon the record. If there is a defence against him, there is a defence against the *cestui que trust* who uses his name, and the plaintiff cannot be permitted to say, for the benefit of another, that his own act is not binding. The following are the authorities which appear to us fully to warrant that proposition. In *Bauerman v. Radenius*,

7 T. R. 663, in which the question was, whether an admission by the plaintiff, who was clearly a trustee for another, should be received in evidence. Lord Kenyon says, "If the question which has been made in this case had arisen before Sir Matthew Hale, or Lords Holt or Hardwicke, I believe it never would have occurred to them, sitting in a court of law, that they could have gone out of the record, and considered third persons as parties in the cause. Here it has been contended, that Bauerman & Co. are to be laid out of the case entirely, and we are desired to substitute Van Dyck & Co. as plaintiffs in their room; but if they may be taken to be off the record, then they may be witnesses, and yet it is not pretended, that they could have been examined: the argument, therefore, that asserts that they may be taken from off the record, not holding good to all purposes, fails entirely. I cannot conceive, on what ground it can be said, that Bauerman & Co. may be considered not as parties in the cause, for the purpose of rejecting their admissions, and yet, as the parties in the cause, for the purpose of preventing their being examined as witnesses. I take it to be an incontrovertible rule, that the admission made by a plaintiff upon the record is admissible evidence." So, a release by the plaintiff, upon the record, suing for the benefit of another, was decided, in a case before Lord Mansfield, to be a good answer at law, cited in *Bauerman v. Radenius*; and Lawrence, J. expresses the same opinion in the case last mentioned. The courts of law have been in the habit of exercising an equitable jurisdiction upon motion, and setting such releases aside, or preventing the defendant from pleading them, as in *Legh v. Legh*, 1 B. & P. 447, *Payne v. Rogers*, Doug. 391, *Jones v. Herbert*, 7 Taunt. 421, and by Abbott, C. J., in *Skaife and another v. Jackson*, 3 B. & C. 421, and many other cases, which practice shows very clearly the opinion of the Courts, that but for their equitable interference, the real plaintiff could not be heard. Again, in *Alner v. George*, 1 Camp. 392, where trustees for the benefit of creditors sued in the name of the insolvent, Lord Ellenborough held, that a receipt in full, for the amount by the plaintiffs, was an answer to the action; and his Lordship said, "If a motion had been made in term time, to prevent the defendant from availing himself of this defence, perhaps we might have interfered. Sitting here, I can only look to the strict legal rights of the parties upon the record; and there can be no doubt, that a receipt in full, where the person who gave it was

under no misapprehension, and can complain of no fraud or imposition, is binding upon him. The plaintiff might have released his action, and it is impossible to admit evidence of his attempting to defraud others." In *Jones v. Yates*, 9 B. & C. 532, Lord Tenterden, C. J., said, "We are not aware of any instance, in which a person has been allowed, as plaintiff, in a court of law, to rescind his own act, on the ground that such act was a fraud on some other person; for a party seeking to do that, has the benefit of his own fraud;" and therefore, it was held, where one of two partners disposed of some of their effects in trade, in fraud of the other, both could not sue, in a court of law, to recover for them in an action of trover. Upon principle, and on these authorities, we are of opinion, if there be a good defence against the plaintiff, there is a good defence against *Le Quesne* suing in his name. The only remaining question is, whether there is a good defence against the plaintiff. Now, if the plaintiff was suing, himself, it is clear the plea of payment would have been proved, for credit given to the plaintiff, for the amount of premiums, was equivalent to payment by the defendants to the plaintiff of that amount. We therefore think, the defendants were no longer liable; but as this point, upon which we decide the case, was intended to be reserved by Lord Tenterden, in which case a nonsuit would have been entered, we think, a similar rule should be now pronounced.

*Rule absolute for entering a nonsuit.*¹

¹ If an obligation is held in trust, a release given by the obligee-trustee to the obligor, is effectual at law. *Groos v. Depeham*, 1 Cal. Ch. XLVIII.; Y. B. 11 Ed. IV. fol. 8, pl. 13; *Anon.*, 7 T. R. 666 (*cited*).

If the obligor had notice that it was a breach of trust to give the release, or if he gave no value for the release, the *cestui que trust* will be protected. The release may be set aside in equity. *Land Co. v. Peck*, 112 Ill. 408; *Monmouth Co. v. Hutchinson*, 21 N. J. Eq. 107; *Wilson v. Stilwell*, 14 Oh. St. 464. Or the courts of law in the exercise of equitable jurisdiction upon motion will set the release aside or prevent the defendant from pleading it. See, in addition to the cases cited in the principal case, *Hickey v. Burt*, 7 Taunt. 48; *Mountstephen v. Brooke*, 1 Chitty 390; *Innell v. Newman*, 4 B. & Ald. 419; *Manning v. Cox*, 7 Moore 617; *Barker v. Richardson*, 1 Y. & J. 362; *Green v. Williams*, *Manning*, N. P. Index, 2 ed., 127; *De Pothonier v. De Mattos*, E. B. & E. 461; *Mandeville v. Welch*, 1 Wheat. (U. S.) 233, 5 Wheat. 277; *Brown v. Hartford Co.*, *Brunner* 663; *Wolfe v. Bate*, 9 B. Mon. (Ky.) 208; *Hart v. Western Corp.*, 13 Met. (Mass.) 99; *Troeder v. Hyams*, 153 Mass. 536, 538; *Hale v. Dressen*, 73 Minn. 277, 76 Minn. 183; *Jones v. Jones*, 66 N. H. 198; *Green v. Beatty, Cox* (N. J.) 142; *Timan v. Leland*, 6 Hill (N. Y.) 237; *M'Cullum v. Cox*, 1 Dall. (Pa.) 139. Indeed

WETMORE, AS EXECUTOR, v. PORTER.

COURT OF APPEALS, NEW YORK. 1883.

92 N. Y. 76.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 3, 1882, which affirmed a judgment in favor of defendant, entered upon an order sustaining a demurrer to plaintiff's complaint herein.

RUGER, Ch. J. The defendant demurred to the complaint upon the grounds:

1st. That there was a defect in the parties defendant, in that the plaintiff should also have been made a defendant.¹ . . .

The complaint sets forth among other things that one Alpheus Fobes died at New York city about the 1st day of July, 1872, having executed a last will and testament, which was admitted to probate by the surrogate of the county of New York, and letters testamentary were duly issued thereon to Abram B. Wetmore as sole executor, who thereafter took the oath of office and duly qualified; that nine \$1,000 railroad bonds were of the assets belonging to said estate and were of the value of \$12,000; that by an order of the surrogate made on or about the 26th day of May, 1874, the plaintiff was directed to keep the property of the estate, including said bonds, then remaining in his hands invested, and to continue in the discharge of his trust according to the terms of the will; that said bonds came into the custody of the defendant by an arrangement between the plaintiff and defendant (who then knew that the same were trust funds) whereby they were to be used as collateral security at a bank in New York for the firm notes of Porter & Wetmore. That firm consisted of the plaintiff and defendant, who were engaged in carrying on a general commission business for their joint individual benefit. The complaint further alleges that the

in some jurisdictions such a release has been regarded as a nullity. *Roden v. Murphy*, 10 Ala. 804; *O'Reilly v. Miller*, 52 Mo. 210; *McClaghry v. McClaghry*, 121 Pa. 477. See Ames, 266n., 268n.

Set-off. If the obligee-trustee sues the obligor, the latter may at common law set off a debt due to him from the plaintiff individually. But equity will prevent the obligor from relying on the set-off if he knew of the rights of the *cestui que trust*. Ames, 270n. See note to *Bischoff v. Yorkville Bk.*, 218 N. Y. 106, *post*.

¹ Only as much of the opinion is given as relates to this ground of demurrer.

bonds did not belong to the plaintiff individually, but were owned by the estate, and that plaintiff had long tried to re-obtain possession of them for the purpose of holding them to accomplish the objects of the trust, but that his efforts had been defeated by defendant; that on the 11th day of April, 1881, the bonds were procured to be sold by the defendant, and on the 12th day of April, 1881, and on several occasions previous thereto, the plaintiff demanded the return of the bonds or the payment of the value thereof from the defendant, but that the defendant, admitting that they were in his custody or control, refused to return them or pay their value to the plaintiff. The complaint closed by demanding judgment for the sum of \$15,000 with costs. . . .

The General Term, by a memorandum indorsed upon the papers, and which contains the only information we have of the reasons for their decision, seem to have placed it upon the ground that the complaint showed upon its face that there was a defect of parties defendant. In other words, that the plaintiff should have been made a party defendant with Thomas E. Porter in any action to recover the value or possession of the bonds in question. It, therefore, becomes necessary to refer briefly to the additional allegations contained in the complaint.

It substantially alleges, in addition to what has been recited, that the plaintiff, at the request of the defendant, removed the bonds from the Safe Deposit Company, where the securities of the estate were deposited for safe keeping, and also at defendant's request left them at the Shoe and Leather Bank in New York as security for loans made, and to be made of said bank, by the firm of Porter & Wetmore, to carry on the partnership business, and that the bonds were ordered by defendant on or about the 11th day of April, 1881, to be sold by the Shoe and Leather Bank, and the proceeds applied to pay a firm note of the amount of \$10,000, then held by the bank. It was also alleged that Porter was then owing the plaintiff a large sum of money in respect of the firm business, and had sufficient money belonging to the firm to more than pay the amount of the note, at the time of the sale of the bonds.

Upon this state of facts the court below has held upon the strength of the maxim "*Ex turpi causa non oritur actio*," that inasmuch as Abram B. Wetmore in his individual capacity was in collusion with the defendant in despoiling this estate, that he could not in his representative capacity reclaim these

bonds from one who had wrongfully come into their possession, and restore them to the trust estate. The court further said that "the remedy of the *cestui que trust* is to have another trustee appointed who shall bring the proper action." In this, we think, it proceeded upon a mistaken view of the rights and duties of the parties. The legal title to these bonds, and the right to their custody, was and remains in the trustee, at least until they reach the possession of some person who has paid full value and is ignorant of their trust character. Whoever receives property knowing that it is the subject of a trust, and has been transferred in violation of the duty or power of the trustee, takes it subject to the right, not only of the *cestui que trust*, but also of the trustee, to reclaim possession of the specific property, or to recover damages for its conversion in case it has been converted. *Briggs v. Davis*, 20 N. Y. 15.

In the case of the *Western R. R. Co. v. Nolan*, 48 N. Y. 517, this court says: "The trustees are the parties in whom the fund is vested, and whose duty it is to maintain and defend it against wrongful attacks or injury tending to impair its safety or amount. The title to the fund being in them, neither the *cestui que trust*, nor the beneficiaries can maintain an action in relation to it as against third parties, except in case the trustees refuse to perform their duty in that respect, and then the trustees should be brought before the court as parties defendant."

It is an alarming proposition to urge against the legal title which a trustee has to trust funds that his recovery of their possession may be defeated by a wrong-doer, upon the allegation that the lawful guardian of the funds colluded with him in obtaining their possession. This action is sought to be maintained by the plaintiff solely in his representative capacity as executor or trustee under the will of Alpheus Fobes. . . .

The twin maxims "*Ex dolo malo non oritur actio*" and "*Ex turpi contractu actio non oritur*" have no application to the cause of action set up in the complaint. It is not founded upon and does not grow out of the illegal or unauthorized dealings between the plaintiff and defendant, but such dealings are invoked by one of the wrong-doers to defeat a party who is asserting a legal right and who in this action appears in a representative character alone. We see no reason why a trustee who has been guilty even of an intentional fault is not entitled to his *locus penitentiae* and an opportunity to repair the wrong which he may have committed. . . .

The judgment should be reversed and judgment ordered for the plaintiff upon the demurrer, unless the defendant within thirty days pay plaintiff's costs and answers in the action.

All concur.

*Judgment accordingly.*¹

PARKER v. HALL.

SUPREME COURT, TENNESSEE. 1859.

2 Head 641.

WRIGHT, J. The bill in this case, is filed to recover of the defendant, Jesse D. Hall, a slave, Judy, and her child Henry. . . .

The decision of this case rests upon the following facts, to-wit: In October, 1842, George H. Parker, the father of complainants, George A., Mary and Alvin D. Parker, and of their deceased sister, Malvinia M. Parker, was duly qualified as their guardian in the County Court of Weakley county, in this State; and as such, received into his possession a fund belonging to them.

This fund was derived by them under the will of Alonzo P. Smith, a deceased relation.

On the 6th of May, 1843, the said George H. Parker, the guardian, with a portion of said funds, purchased of C. McAlister, the slave Judy. . . .

The slave Henry is a child of Judy, born after the execution of the bill of sale.

Some two years after its date, the said George H. Parker, with his wards and their mother, and said slaves, removed from Obion, to Tipton county, in this State; and on the 26th of May, 1845, while he was yet a stranger in said county, sold and conveyed Judy and Henry to the defendant, Hall. . . .

¹ Zimmerman v. Kinkle, 108 N. Y. 282; Ludington v. Bank, 102 N. Y. App. Div. 251; Mansfield v. Wardlow (Tex. Civ. App., 1906), 91 S. W. 859, accord. See Ames, 264n. So also the co-trustee of the trustee who committed the breach of trust may sue. Clemens v. Heckscher, 185 Pa. 476. Or a substituted trustee may sue. Leake v. Watson, 58 Conn. 332; Safe D. & T. Co. v. Cahn, 102 Md. 530; First Nat. Bk. v. Nat. etc. Bk., 156 N. Y. 459, 467.

If the trustee loans trust money in breach of trust, the trustee may recover it. Atwood v. Lester, 20 R. I. 660.

If the trustee has erroneously paid the life beneficiary what should have been retained for the remainderman, he may recoup out of the income the amount necessary to restore the capital. Ballantine v. Young, 74 N. J. Eq. 572.

At the time of these transactions, these wards were infants of tender years, and one of them, viz., Alvin D., a complainant, is yet an infant under twenty-one years of age.

They were all infants under twenty-one, in May, 1845, when their guardian sold Judy and Henry to Hall, and when he took possession of them, and for sometime thereafter.

George H. Parker, the guardian, died soon after the sale to Hall; and since his death, Malvinia M., one of the wards, died; and complainant, Mary A., her mother, is her administratrix.

The defences relied upon, are that of an innocent purchaser for value, without notice and the statute of limitations.

Neither of these defences can be allowed to avail the defendant. If he had not actual, he had constructive notice, which is equally fatal to him. . . .

As to the statute of limitations, it can have no operation in the case. When the cause of action accrued, the owners of these slaves were *all* under the disability of infancy, and *one* of them was still an infant, at the institution of this suit; and upon the principles of *Shute v. Wade*, 5 Yer., 1, all are saved from the bar.

The position, that when the trustee is barred all the beneficiaries are barred, though they may be under disability, has no application here. That doctrine only applies where the trustee could sue, but fails to do so, as where a stranger intrudes himself into the trust estate and holds wrongfully, and *adversely both to the trustee and the beneficiaries*. In such a case, if the trustee fail to sue and is barred, the beneficiaries, though infants, &c., are also barred. But here, George H. Parker, the trustee and owner of the legal estate, had estopped himself from suing by his bill of sale. He had turned against his wards, and united with the defendant in a breach of trust. The wrong *was to them, not to him*. He could not sue for, or represent them. In such a case it has been repeatedly held, by this Court, since *Herron v. Marshall*, 5 Hum., 443, that the beneficiaries can alone sue, and if they are under disability when the cause of action accrues, they will not be barred until they are allowed the time given in the statute after the disability is removed.

The record entirely fails to disclose any fraud, or other act on the part of complainant, towards defendant, when he purchased this property which will estop, or repel them from a Court of Equity. 4 Hum., 212; 1 Swan, 437.

The decree of the Chancellor will be reversed, and complainants will have a decree for the slaves Jude and Henry, and increase of Judy, born since the defendant's purchase, with hires and interest; but if the slaves have been so disposed of that they cannot be had, then a decree will go for their present value, hires and interest. 10 Yer., 217.

*Decree reversed.*¹

MANN v. THE SECOND NATIONAL BANK OF
SPRINGFIELD, OHIO.

SUPREME COURT, KANSAS. 1883.

30 Kan. 412.

BREWER, J. This was an action on a negotiable promissory note. Trial by jury. The court instructed the jury peremptorily to find for the plaintiff, and of this defendants complain. The note was given in payment of a Champion harvester and cord binder. In the sale of this machine a warranty was given, and the defense was a breach of the warranty, and therefore a failure of the consideration. Upon the trial, testimony was offered in support of this defense, and finally it was admitted that the defendants were entitled to a verdict, unless the plaintiff was a purchaser of the note for a good and valuable consideration before maturity, without notice of the failure of the warranty. The note was in form to the order of Amos Whitely, president. It was due January 1, 1882, and was indorsed and transferred to plaintiff, December 14, 1881. The note, though in form to the order of Amos Whitely, was the property of the Champion machine company, was taken by it on the sale of the machine, in the name of its president, for convenience, and by it, through the indorsement of its president, transferred to the plaintiff. The failure of the warranty was communicated to the general

¹ See *Kennedy v. Daly*, 1 Sch. & Lef. 355, 377; *Elliott v. Landis Machine Co.*, 236 Mo. 546; 11 Col. L. Rev. 686; 12 Harv. L. Rev. 132; *Wood, Limitations*, 4 ed., sec 208. But see *Johnson v. Cook*, 122 Ga. 524; *Willson v. Trust Co.*, 102 Ky. 522.

If a trustee in good faith paid to the life beneficiary what should have been retained for the remainderman who was an infant, the latter may recover against the trustee or the life beneficiary if the period of the Statute of Limitations has not run since the remainderman reached his majority. *Ballantine v. Young*, 74 N. J. Eq. 572.

agent of the company at St. Joseph, Missouri, before the note became due, and while it was in the possession of the company. It further appears, that the only officer of the bank who took part in the discount and purchase of this note by the plaintiff, was its cashier, John G. Benalack, who had been cashier since August 15, 1881. Up to a month prior to such time, he had been book-keeper of the Champion company, and knew in a general way that the consideration of notes received by the company was its machines. He had no personal knowledge of the consideration of this note, or the failure of the warranty in the sale of the machine, or of any other matters connected with it. The note was brought to him by the cashier of the Champion company for discount, in the ordinary course of business. After having been discounted, it was held by the bank until sent forward for collection. Suit was commenced March 11, 1882. Amos Whitely, the president of the machine company, who indorsed this note, was a director of the plaintiff bank, and one of the three members constituting its discount committee at the time this note was discounted. The note was never formally presented to the discount committee, but it was discounted by the cashier, under general instructions from the officers to discount any paper offered by certain customers of the bank, included among whom was the Champion machine company. These instructions were given by the president, and perhaps, according to the testimony of the cashier, by Amos Whitely, also. Prior to the first of January, 1882, Amos Whitely was in the habit of visiting the bank once or twice a week, and was as familiar with its business as directors usually are. His connection with the Champion machine company was not only as president, but also as its actual business manager.

Further, at the time of discount no money was paid directly to the machine company, but the amount of the discount, \$142.14, was credited to the account of the machine company. At that time, and since, up to the time of the commencement of this action, the machine company carried an average balance of several thousand dollars in the bank.

This, we believe, covers all the material testimony. All bearing upon the indorsement and transfer of the note to plaintiff, and the relations of the Champion machine company to the plaintiff, was in the deposition given by the cashier of the the plaintiff. Upon this testimony two important questions arise: First, did the bank take with notice of the defense to

the note?¹ second, had it so paid for the note that it could claim the benefits of a *bona fide* purchase for value? . . .

In reference to [the second] question, it will be observed that the bank in fact paid nothing to the company at the time of the discount. It simply credited the company on its books with the amount of the discount, and thereby enlarged the company's account with the bank. It is not a case in which the company's account was overdrawn, and in which it was indebted to the bank, which indebtedness was reduced by the amount of the discount. On the contrary, the bank owed the company, and it simply, by the discount, increased the amount of this indebtedness, an indebtedness which continued until after suit was brought, and the bank had full notice of the defense. Now conceding that the bank was a *bona fide* holder, that it acquired title, in the first instance, without any notice of any infirmity, to what extent is it protected? The general rule in such cases is, that a *bona fide* holder is protected to the amount he has paid, or lost, by virtue of the discount. In the case of *Dresser v. The Construction Co.*, 93 U. S. 92, it was held that a *bona fide* holder of negotiable paper purchased before its maturity, upon an unexecuted contract, on which part payment only had been made when he received notice of fraud and a prohibition to pay, is protected only to the amount paid before the receipt of such notice. In the opinion, which covers simply that point, the authorities are fully cited, and the conclusion reached is the unanimous opinion of the court. In *Bank v. Valentine*, 18 Hun, 417, it is held that the mere discounting of a note, and giving a party credit on the books of the bank for the amount thereof, does not constitute the bank a holder for value. A similar proposition is laid down in *Dougherty Bros. & Co. v. The Bank*, 93 Pa. St. 227.

We do not cite the various cases in support of the general proposition, for they are fully cited and discussed in the opinion of the court in 93 U. S., *supra*. The proposition rests on the plainest principles of justice, and in no manner impairs the desired negotiability and security of commercial paper. Whenever the holder is a *bona fide* holder, he has a right to claim protection, but protection only to the extent he has lost or been injured by the acquisition of the paper. If he has parted with value, either by a cash payment or the cancellation of a debt, or giving time

¹ The court was inclined to think that the bank should be held bound by the knowledge of Whitely. The part of the opinion relating to this is omitted.

on a debt, or in any other manner, to that extent he has a right to claim protection; but when he has parted with nothing, there is nothing to protect. A mere promise to pay is no payment. He may rightfully say to the party from whom he purchased: "The paper you have given me is valueless, and therefore I am under no obligations to pay;" and if the paper be in fact valueless, payment cannot be compelled. Now the relation of a bank to its depositor is simply that of debtor. The bank owes the depositor so much. If the deposit is valueless its obligation to pay is without consideration, and it may decline to pay. There is nothing in the relation of a bank to its depositor which takes its obligation to its depositor out of the general rule of debtor to creditor. The case of *Bank v. Crawford*, 2 Cin. Superior Court, cited by defendant in error, is a case in which the depositor's account was overdrawn, and the discount therefore was practically the payment of an antecedent debt. In such a case the bank, having taken the paper in payment of an antecedent debt, was entitled to protection to the amount of such debt. *Draper v. Cowles*, 27 Kas. 484.

We therefore think that the bank, having paid nothing at the time of its discount, having simply increased its debt to the depositor, the machine company, and that debt remaining unpaid at the time suit was brought, and it having received actual notice of the infirmity of this paper, cannot claim the protection of a *bona fide* holder for value. . . .

The judgment will therefore be reversed, and the case remanded for a new trial.

*All the Justices concurring.*¹

¹ *McNight v. Parsons*, 136 Iowa 390; *City Dep. Bk. Co. v. Green* (Iowa, 1906), 103 N. W. 96, 106 N. W. 942; *Citizens' State Bk. v. Cowles*, 180 N. Y. 346; *Manufacturers' Nat. Bk. v. Newell*, 71 Wis. 309; *Hodge v. Smith*, 130 Wis. 326, *accord*.

Royal Bank v. Tottenham, [1894] 2 Q. B. 715, 717; *Capital & Counties Bk. v. Gordon*, [1903] A. C. 240, *contra*. See Ames, 287 last paragraph; *Crawford*, *Neg. Inst. Law*, 4 ed., 97; *Pomeroy*, *Eq. Juris.*, sec. 750, 751.

But if payment is subsequently made before notice, the purchaser is protected. *Fox v. Bank*, 30 Kan. 441; *First Nat. Bk. v. McNairy*, 122 Minn. 215; *Cunningham v. Holmes*, 66 Neb. 723; *U. S. Nat. Bk. v. McNair*, 114 N. C. 335; *Merchants Nat. Bk. v. Santa Maria Sugar Co.*, 162 N. Y. App. Div. 248.

A promise of marriage is held to be a valuable consideration. *Smith v. Allen*, 5 Allen (Mass.) 454; *Huntress v. Hanley*, 195 Mass. 236 (*semble*); *De Hierapolis v. Reilly*, 44 N. Y. App. Div. 22. But see *contra*, *Lionberger v. Baker*, 88 Mo. 447.

The giving of a negotiable instrument which is subsequently negotiated

TOURVILLE *v.* NAISH.

CHANCERY. 1734.

3 P. Wms. 307.

A. PURCHASED an estate, and having paid down part of the purchase money, gave bond for the residue. The plaintiff had an equitable lien on the purchased premises, of which the defendant alleged he had no notice at the time of making his purchase, but was apprised thereof before payment of the money due on the bond. And it was contended, that this notice was not material, since the giving the bond was as payment; and the purchaser, after he had given his bond for payment of the purchase money, is bound in all events to proceed, and cannot plead at law that there is an equitable incumbrance on his purchased premises.

LORD CHANCELLOR [TALBOT]. If the person who has a lien in equity on the premises, gives notice before actual payment of the purchase money, it is sufficient; and though the purchaser has no remedy at law against the payment of the residue, for which he gave his bond, yet he would be entitled to relief in equity, on bringing his bill, and shewing, that though he has given his bond for payment of the residue of his purchase money, yet, now he has notice of an incumbrance, under which circumstances the court would stop payment of the money due on the bond. This the Lord Chancellor declared, though in the principal case there was proof of a notice precedent to the purchase, by a letter read to the purchaser, mentioning the equitable lien on the premises.¹ . . .

to a *bona fide* purchaser is certainly value. *Davis v. Ward*, 109 Cal. 186 (*semble*); *Partridge, Wells & Co. v. Chapman*, 81 Ill. 137; *Freeman v. Deming*, 3 Sand. Ch. (N. Y.) 327.

If the purchaser gives his negotiable instrument and it has not been negotiated at the time he receives notice, it is generally held that he is not protected. *Davis v. Ward*, 109 Cal. 186; *Rush v. Mitchell*, 71 Iowa 333; *Jones v. Glathart*, 100 Ill. App. 630, 641. But see *contra*, *Citizens' Bk. v. Shaw*, 14 S. D. 197.

¹ The weight of authority supports the principal case, but allows the purchaser to retain the title until he is repaid the amount paid by him before notice. *Henry v. Phillips*, 163 Cal. 135; *Youst v. Martin*, 3 S. & R. (Pa.) 423; *Ames*, 288; *Pomeroy*, Eq. Juris., sec. 750.

In a few cases it has been held that a purchaser who has paid part of the

HOWELLS v. HETTRICK.

COURT OF APPEALS, NEW YORK. 1899.

160 N. Y. 308.

BARTLETT, J. It is sought in this action to have an assignment to plaintiff's intestate in 1879 of the interest of Margaret W. Hettrick in the estate of the late John H. McCunn adjudged to be a superior lien to a claim made upon the same interest by defendant.

The assignment to plaintiff's intestate was executed and delivered about August 21st, 1879, as collateral security to a debt that is undisputed.

On the 5th of September, 1882, the defendant recovered a judgment against Margaret W. Hettrick for the sum of \$2,683.22.

On the 11th of October, 1882, plaintiff's intestate recovered judgment against Margaret W. Hettrick for \$2,391.25, the amount of his claim against her.

The assignment to plaintiff's intestate was not recorded as a mortgage, but by error was placed in a book of Conveyances.

On the 26th of September, 1882, Margaret W. Hettrick executed and delivered to the defendant a warranty deed which conveyed to him an undivided two seventy-fifths parts in fifteen certain parcels of land in the city of New York; this conveyance was duly recorded.

The consideration for the deed was the satisfaction of the judgment recovered by the defendant against Margaret W. Hettrick September 5th, 1882, as aforesaid, which was recorded September 30th, 1882.

The premises, a portion of which was covered by the foregoing deed to defendant, were partitioned, and the sum of two thousand dollars, the share of Margaret W. Hettrick, is now held by the United States Trust Company as the fund involved in this action.

purchase price may retain the property purchased, subject to a lien in favor of the equitable encumbrancer for the amount of the unpaid purchase money. *Citizens' Bk. v. Shaw*, 14 S. D. 197; *Mitchell v. Dawson*, 23 W. Va. 86. See Ames, 288; *Pomeroy*, Eq. Juris., sec. 750.

Payment part in cash and part in satisfaction of an antecedent debt is value. *Curtis v. Leavitt*, 15 N. Y. 9, 179 (*semble*); *Glidden v. Hunt*, 24 Pick. (Mass.) 221; *Baggaly v. Gaither*, 2 Jones Eq. (N. C.) 80.

It is conceded that if the defendant took without actual notice of the assignment, and is a *bona fide* purchaser under his deed, that his claim upon the fund is superior to that of the plaintiff under her unrecorded assignment. . . .

The course of the trial below leads strongly to the conclusion that it is highly improbable the defendant, on a new trial, can succeed in showing he did not have actual notice of the plaintiff's assignment, but it is exceedingly doubtful if the record shows that he certainly cannot.

It, therefore, is necessary to consider the sufficiency, in law, of the consideration which the defendant claims supports the conveyance to him, and we will assume for the argument's sake that he took his deed without actual notice of plaintiff's assignment.

The nature of the consideration for this deed rests upon undisputed evidence.

The trial court found that it was the satisfaction of the judgment that defendant recovered against Margaret W. Hettrick September 5th, 1882. The complaint resulting in this judgment shows that the indebtedness was for money loaned and property sold Margaret W. Hettrick years before. It is clear that the judgment represented an antecedent indebtedness of long standing.

In *DeLancey v. Stearns* (66 N. Y., at page 161), Judge RAPALLO said: "It has been held in numerous cases that one who, without notice of a prior unrecorded mortgage, takes a conveyance of land in payment of an existing debt or as security therefor, without giving up any security, divesting himself of any rights, or doing any act to his own prejudice on the faith of the title, before he has notice of the mortgage, is not a *bona fide* purchaser."

The surrender by defendant of the right to enforce his judgment just recovered as a consideration for a deed which was the absolute payment of the greater part of his claim, which for years had remained uncollected, was not divesting himself of any right or security to his own prejudice, but was the act of assuming a far more favorable position.

Within all the controlling cases in this state the defendant is not a *bona fide* purchaser, assuming he had no notice of the plaintiff's assignment. *Dickerson v. Tillinghast*, 4 Paige, 215; *Evertson v. Evertson*, 5 Paige, 644, and cases cited; *Weaver v. Barden*, 49 N. Y. 286, 293; *Cary v. White*, 52 N. Y. 138;

Westbrook v. Gleason, 79 N. Y. 28, and cases cited; Young v. Guy, 87 N. Y. 462.

The judgment appealed from should be affirmed, with costs.

All concur.

*Judgment affirmed.*¹

CHACE v. CHAPIN.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1881.

130 MASS. 128.

COLT, J. This is a bill in equity in which the plaintiff seeks to recover a dividend on certain shares of the capital stock of the Old Colony Railroad Company, now standing in the name of Chapin and Braley, as the assignees in bankruptcy of Samuel A. Chace. He claims to be entitled to the income of this stock for

¹ By the great weight of authority at common law, one who takes either money (*Holly v. Missionary Society*, 180 U. S. 284; *Spaulding v. Kendrick*, 172 Mass. 71; *Stephens v. Board of Ed.*, 79 N. Y. 183) or negotiable paper in satisfaction of or as security for an antecedent debt is a purchaser for value. The rule was otherwise in New York and Pennsylvania in the case of taking negotiable paper as security for an antecedent debt. *Coddington v. Bay*, 20 Johns. (N. Y.) 637.

By the Negotiable Instruments Law (sec. 25) it is provided that "an antecedent or pre-existing debt constitutes value." At first the New York courts were inclined to hold that this did not make one who takes negotiable paper as security for an antecedent debt a purchaser for value. But this view was later abandoned. *A. E. McBee Co. v. Shoemaker*, 174 N. Y. App. Div. 291; *King v. Bowling Green T. Co.*, 145 N. Y. App. Div. 398; *Crawford*, *Neg. Inst. Law*, 4 ed., 63.

Except in the case of negotiable instruments or money, however, it is generally held that one who takes property as security for an antecedent debt is not a purchaser for value. And in the case of payment of an antecedent debt, the weight of authority is to the same effect, although there is considerable authority the other way. *Pomeroy*, *Eq. Juris.*, sec. 749; *Williston*, *Sales*, sec. 620.

By the Uniform Sales Act, sec. 76, it is provided that "'Value' is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction thereof or as security therefor." See *Williston*, *Sales*, sec. 619. See also *Uniform Stock Transfer Act*, sec. 22.

As to the effect of the surrender or cancellation of securities held by the creditor, see *Franklin Sav. Bk. v. Taylor*, 53 Fed. 854; *Richardson v. Wren*, 11 Ariz. 395; *Grand Rapids Nat. Bk. v. Ford*, 143 Mich. 402; *Pomeroy*, *Eq. Juris.*, sec. 749.

life, by virtue of and in accordance with the terms of a trust created by Mrs. Holmes when she transferred to said Samuel a legal title to the stock.

The defendants deny the existence of the trust; and Chapin and Braley, as assignees in bankruptcy, contend that, as holders for value in good faith and without notice, they are entitled to have the stock discharged of any trust that may have existed while the title was in the bankrupt. . . .

As to the claim of the assignees in bankruptcy, that the trust, if it ever existed, was discharged by the conveyance of Chace to Brayton as trustee, to secure his debts to the Union Mills and others, on the ground that Brayton took as a holder for value without notice, the first answer is, that at common law an assignee under a general assignment for the benefit of creditors takes no better title and no higher rights than the assignor himself had, and is not to be regarded as a purchaser for a valuable consideration without notice. If the assigned estate is subject to a trust, the assignee takes subject to the rights of the equitable owner. *In re Howe*, 1 Paige, 125. *Van Heusen v. Radcliff*, 17 N. Y. 580. *Griffin v. Marquardt*, 17 N. Y. 28.

A further answer to the claim is that the conveyance to Brayton was wholly defeated by the subsequent bankruptcy of Chace. The assignees took, not as purchasers of Brayton's title, but under their rights as assignees in bankruptcy, and subject to all the legal and equitable claims of others. The statute declares that "no property held by the bankrupt in trust shall pass by the assignment." U. S. Rev. Sts. §5053. "Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property. They take such estate only as the bankrupt had a beneficial as well as legal interest in, and which is to be applied to the payment of his debts." *Rhoades v. Blackiston*, 106 Mass. 334. See also *Cook v. Tullis*, 18 Wall. 332; *Kelly v. Scott*, 49 N. Y. 595; *In re McKay*, 1 Lowell, 345.

*Decree for the plaintiff.*¹

¹ By the great weight of authority it is held that an assignee for the benefit of creditors is not a purchaser for value. *Martin v. Bowen*, 51 N. J. Eq. 452; *Smith v. Equitable T. Co.* (No. 1), 215 Pa. 418; *Stainback v. Junk Bros. etc. Co.*, 98 Tenn. 306; *Ames*, 393; 2 *Pomeroy*, Eq. Juris. sec. 749. But see *contra*, *Wickham v. Lewis Martin & Co.*, 13 Gratt. (Va.) 427; *Chapman v. Chapman*, 91 Va. 397 (*semble*); *Gilbert Bros. v. Lawrence Bros.*, 56 W. Va. 281; *Marshall v. McDermitt*, 79 W. Va. 245.

A trustee in bankruptcy is not a purchaser for value. *Ames*, 342. The

National Bankruptcy Act (1898), sec. 70a (5) provides that there shall pass to the trustee in bankruptcy "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." By the amendment of 1910 to sec. 47a (2), it is provided that "such trustee . . . shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings."

The trustee in bankruptcy does not even get the legal title to property held by the bankrupt as an express trustee. *Ex parte Chion*, 3 P. Wms. 187n.; *Ex parte Gennys*, Mont. & M. 258; Ames, 392.

A judgment creditor is not a purchaser for value. *Whitworth v. Gaugain*, 3 Hare 416, 1 Phil. 728; *Dyson v. Simmons*, 48 Md. 207; *Harney v. First Nat. Bk.*, 52 N. J. Eq. 697; Ames, 408-414; *Pomeroy*, Eq. Juris., sec. 721. In *Whitworth v. Gaugain*, 3 Hare 416, Wigram, V. C., said: "The most plausible way of stating the case in favor of the judgment creditor is by supposing his right to be founded in contract, and not to be the result of a proceeding in *invitum*; and this, no doubt, may be the truth of the case, when the judgment is voluntarily confessed; and I paid the greatest attention to the arguments of counsel upon that point. But, admitting that view to be correct, how does it alter the case? The question remains, — what was the contract? It was a general contract for a judgment, and the fruits of a judgment; and the original question, therefore, — what right does a judgment confer? — remains wholly untouched by the concession. If a party contracts specifically for a given property, pays the purchase-money, and obtains the legal title, without notice up to the time of obtaining the conveyance, as well as of paying his money, that may give him a right to be preferred to an equitable claim which is prior in point of time. But there is no principle upon which a court of justice can be required to imply that a general contract to give a judgment is a contract to give that which does not belong to the debtor. If the trustee were to confess a judgment, am I to imply that it amounts to a specific contract to give the creditor an interest in that which belongs to the *cestui que trust*? That appears to me to be the true distinction. In one case the party contracts for a specific thing, — in the other he merely takes a judgment, that gives him nothing more than a right to that which belongs to his debtor."

In some states however by statute a creditor who has a judgment lien is treated as a purchaser for value. Ala. Code, 1907, sec. 3413 (see *Guin v. Guin*, 196 Ala. 221); Okla. R. L., 1910, sec. 6673; *Pomeroy*, Eq. Juris., sec. 722.

A creditor who attaches or levies execution is not a purchaser for value. *Waterman v. Buckingham*, 79 Conn. 286; *Houghton v. Davenport*, 74 Me. 590; *Harris v. Gaines*, 2 Lea (Tenn.) 12. See *Byrne v. McGrath*, 130 Cal. 316; *Perry, Trusts*, sec. 815b.

DOE ON THE DEMISE OF GILES *v.* PALMER.

SUPREME COURT, NORTH CAROLINA. 1857.

4 Jones 386.

THIS was an action of ejectment. The property in question was conveyed to the defendant, as the trustee of his wife. While he was thus seized, it was levied upon and sold, by virtue of an execution in favor of Foley and Woodside against him, and the plaintiff purchased it at auction, and took the sheriff's deed for the same.

Judgment below was rendered *pro forma* for the defendant. Plaintiff appealed.

NASH, C. J. The defence offered in this action, cannot avail the defendant here. The defendant holds the land in question as trustee for his wife; as such the legal title is in him. The lessor of the plaintiff is the purchaser of the land at a sheriff's sale, under an execution against the defendant. A purchaser at a sheriff's sale succeeds to all the rights of the defendant in the execution; that is, acquires the interest the latter had, whatever that may be, in the state it was in at the time the execution was levied. *Rutherford v. Green*, 2 Ire. Eq. 121. The defendant, in the execution, cannot deny the purchaser's right to stand in his shoes. Should the plaintiff, in this case, attempt to deprive the trustee of the possession of the premises, the remedy of the *cestui que trust* will be in a Court of Equity.

There is error in the judgment below, and, by consent of the defendant, judgment is rendered for the plaintiff.

PER CURIAM.

*Judgment reversed.*¹GOWER *v.* DOHENEY.

SUPREME COURT, IOWA. 1871.

33 Iowa 36.

ACTION of right for the possession of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, and N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 31, tp. 77, range 25 west. Upon the answer of the defendant, the cause was transferred

¹ *Stith v. Lookabill*, 71 N. C. 25, *accord*. In a few jurisdictions, however, there are decisions to the effect that the trust *res* cannot be reached even at law. Ames, 408n.

to the chancery docket, and tried by the first method of trying equitable causes. The plaintiff's petition was dismissed, and he appeals. The facts are stated in the opinion.

DAY, C. J. The plaintiff's chain of title to the lands in controversy is as follows, to wit: George S. Hampton entered the same on the 18th day of February, 1854. At the March term, 1858, of the district court of Johnson county, James H. Gower, Bros. & Co. obtained judgment against said Hampton, for \$411.20.

February 4, 1860, execution issued on said judgment, directed to the sheriff of Warren county, and on the 18th day of February, 1860, a transcript of the judgment was filed in the office of the clerk of said county. On the 10th day of March, 1860, said execution was levied on the lands in question, and on the 1st of May following, they were sold in pursuance of said levy, to James H. Gower, Bros. & Co., for \$125.00. On the 18th day of June, 1860, Gower Bros. & Co. assigned the certificate of purchase to James Otis Gower, who obtained a sheriff's deed for the same on the 22d day of July, 1864, and caused the same to be duly filed for record on the day following. James Otis Gower, on the 31st day of December, 1864, made his last will, devising said lands to plaintiff, and on the 12th day of September, 1865, died in Johnson county. The will was duly probated, and on the 24th day of April, 1869, was filed for record in the office of the recorder of Warren county.

It was proved that James Otis Gower, in May, June and July, 1861, was engaged in recruiting a company for the 1st Iowa Cavalry; that he went into the United States service in July, and remained till August, 1863, when he was discharged for disability, and that he was not able afterward to attend to business, which was the cause of the delay in obtaining the deed, and that neither plaintiff nor James H. Gower, Bros. & Co. had any knowledge of the claim of defendant, White, to said land, till long after the sheriff's sale, and but a short time before the commencement of this suit.

The defendant, Martin Doheney, also claims title to the lands in controversy, through George S. Hampton, as follows, to wit: The said Hampton, as the agent of Miles White, and with money by him furnished, entered said lands in his own name in order that upon sale thereof he might convey the same without the delay of sending to White for a deed. On the 28th day of November, 1858, Hampton, having failed to make sale

of the lands, executed and delivered to Miles White a deed for the same, which was filed for record on the 10th day of January, 1861. On the 31st day of August, 1868, White conveyed said lands to Doheney, by deed, which was duly filed for record September 8, 1868.

We have thus a case wherein the judgment debtor, holding the legal title of the lands in controversy under an implied trust, after judgment was obtained against him, but before a transcript of the judgment was filed in the county in which the lands were situated, conveyed the same to the *cestui que trust*, who failed to file the deed for record until eight months after the sheriff's sale.

We are thus brought to consider in what manner the judgment creditor, purchasing at a sheriff's sale, and those holding under him, are affected by equities of third persons or their claims under unrecorded deeds. It is well settled that a *third person*, who purchases at a sheriff's sale, without notice of outstanding equities, is entitled to the same protection as any other purchaser without notice and for value. The rule, however, as to the judgment creditor has oscillated somewhat, and can scarcely yet be regarded as settled in this State. In *Norton, Jewett and Busby v. Williams*, 9 Iowa, 529, which was an action of right, it was said that the rule that relief should not generally be granted against a *bona fide* purchaser without notice has no place in favor of a judgment creditor though he may have no notice of the outstanding equity. As the purchaser in that case, however, was a *third party*, with both *actual* and *constructive* notice of the outstanding deed, which was filed for record after judgment, but *before* the sheriff's sale, this point was not involved in that case, and what is said in regard to it is only *dictum*. In the case of *Parker v. Pierce*, 16 Iowa, 227, the question whether a purchaser, at a sale under execution, will take the land discharged of every claim or title, whether arising on an unregistered deed or a mere equity, was expressly left undecided. In the case of *Vannice v. Bergen*, 16 Iowa, 556, it was maintained by Justice DILLON, in his dissenting opinion, that a purchaser at sheriff's sale will take the land discharged of every claim or title, whether arising under an unregistered deed, or a mere equity, of which he had no notice at the time of his purchase, and which would be invalid against an ordinary purchaser; and that "the rule applies equally when the judgment creditor is the purchaser, as when the purchase is made by a stranger."

In the case of *Evans v. McGlasson*, 18 Iowa, 152, the court united in holding that a judgment creditor, who becomes a purchaser at sheriff's sale, is protected at law against matters of which, at the time of the purchase, he had no notice, and that this rule also obtains in equity, unless there are equities of so strong and persuasive a nature as to prevent its application; and these, if they are relied upon, must be *alleged* and *proved*. As no such equities have been established in the present case, the doctrine of *Evans v. McGlasson* may be regarded as direct authority for sustaining the title of the plaintiff. But the rights of the judgment creditor received more direct recognition, in the case of *Halloway v. Platner*, 20 Iowa, 121, in which it was held that when a creditor merges his judgment into a title without actual or constructive notice of prior equities he becomes a purchaser, within the meaning of section 2220 of the Revision, and is entitled to equal protection, in the absence of equitable circumstances, with any other subsequent *bona fide* purchaser. We attach no importance, under the circumstances of this case, to the delay in obtaining the sheriff's deed. Had the deed been procured and placed upon record at the time of the expiration of the period for redemption, White would, so far as appears, have occupied precisely the same position as now. It is not shown that he has sustained any loss, even to the amount of the filing fee of his deed, from the delay in procuring the sheriff's deed. When Hampton conveyed to him, the judgment was not a lien upon the property conveyed. If the subsequent taking of the property to satisfy Hampton's debt gave White any right of action against him, it does not appear but that he was just as solvent when the sheriff's deed was procured as when the year for redemption elapsed.

The deed was executed and filed for record more than four years before the defendant, Doheney, purchased from White. Hence, he stands in White's place and with no better rights. If he had purchased *before* the sheriff's deed had been recorded, a different question would be presented.

The defendant, Doheney, is not in a position to claim the protection of a court of equity. His grantor failed for more than two years after the execution of the deed to him to have the same filed for record. An examination of the record would have discovered to Doheney, at the time of his purchase, that a sheriff's deed had been upon record for four years, conveying the title of Hampton, under whom his grantor, White, claimed.

It is a wholesome rule of equity that, where one of two innocent persons must suffer, the loss will fall upon that party who has been guilty of the first negligence. *Vigilantibus non dormientibus subserviunt lex.*

The district court erred in dismissing the plaintiff's petition.

*Reversed.*¹

MORE v. MAYHOW.

CHANCERY. 1663.

1 Chan. Cas. 34.

THE PLAINTIFF'S bill was to be relieved upon a trust, and charged the defendant with notice of that trust, and that he had gotten a conveyance of the lands upon which the trust was had; and that at or before his taking the said conveyance, he had notice of the said trust for the plaintiff.

The defendant, by way of answer, denied that he had any notice of the trust, at the time of his purchase or contract, and pleaded that he was a purchaser for a valuable consideration. It was insisted the plea was not good, because he did not say what the valuable consideration was; for 5s. was a valuable consideration; but yet no equitable consideration.

THE COURT declared that the plea in this case was well enough.

It was further insisted, that the plea was founded upon the answer, *viz.* that the defendant had no notice, &c., and that the point of notice was not well answered in that the defendant denied notice at the time of the purchase only, and the word purchase might be understood when the contract for the purchase was made; and it might be he had not notice then, and might

¹ Riley v. Martinelli, 97 Cal. 575, 21 L. R. A. 13; Halloway v. Platner, 20 Iowa 121; Wood v. Chapin, 13 N. Y. 509, *accord*.

Beidler v. Beidler, 71 Ark. 318; Dickerson v. Tillinghast, 4 Paige (N. Y.) 215; Wright v. Douglass, 10 Barb. (N. Y.) 97; Stith v. Lookabill, 76 N. C. 465; Williams v. Hollingsworth, 1 Strob. Eq. (S. C.) 103; Ayres v. Duprey, 27 Tex. 533; Orme v. Roberts, 33 Tex. 768; Main v. Bosworth, 77 Wis. 660, *contra*. See Pomeroy, Eq. Juris., sec. 724.

By the great weight of authority a third person purchasing on execution sale takes free of equities of which he has no notice. Ellis v. Smith, 10 Ga. 253; Den v. Richman, 13 N. J. Eq. 43; Jackson v. Chamberlain, 8 Wend. (N. Y.) 620; Paine v. Moreland, 15 Oh. 435; Ayres v. Duprey, 27 Tex. 593, 605; Ehle v. Brown, 31 Wis. 405. But see *contra*, Banning v. Edes, 6 Minn. 402. See Pomeroy, Eq. Juris., sec. 724.

have notice after, before, or at sealing of the conveyance; and if there was any notice before the conveyance to him executed, that should charge the defendant: and that it was so lately decreed in a cause between Sir William Wheeler and — and Yarroway and Nicholas, by the Lord Chancellor. And so the plea was over-ruled.

LOUISVILLE & NASHVILLE RAILROAD CO.
v. BOYKIN.

SUPREME COURT, ALABAMA. 1884.

76 Ala. 560.

THIS action was brought by Mrs. Frances Boykin, the wife of Burwell Boykin, against the appellant, "a corporation under the laws of Kentucky," to recover damages for the alleged conversion of "eighteen hundred car-loads of gravel;" and was commenced on the 9th May, 1884. The defendant pleaded not guilty, and justification; and also two special pleas, one of which denied the plaintiff's ownership and possession of the land from which the gravel was taken, and the other averred that the land belonged to the South and North Alabama Railroad Company, under whose license defendant entered and took the gravel. Issue was joined on all of these pleas.

[The plaintiff claimed the land as part of a tract containing fourteen acres, which was conveyed to her by W. T. Lary and wife, for \$130, by deed dated November 22d, 1881, in which the boundaries, courses and distances of the land intended to be conveyed were left in blank; and under a second deed executed to her by said Lary and wife, which was dated January 26th, 1884, and purported to be given for the purpose of curing the defects of the first. The defendant claimed the right to take the gravel under a conveyance executed by said Lary and wife, for \$100 and other considerations, to the South and North Alabama Railroad Company, which was dated August 30th, 1873, but was not recorded until the 21st February, 1883. The description in this deed was not sufficiently definite and certain to operate as a legal conveyance. Before the plaintiff obtained the legal estate by the deed of January 26th, 1884, she had notice of the claim of the railroad company.]¹

¹ The statement of facts is abridged and a part of the opinion is omitted.

CLOPTON, J. The parties having waived a decision of all the questions involved, other than the right and title to the gravel in controversy, and as the judgment is to be affirmed or reversed as we may find the right to be in the plaintiff or defendant, we shall confine our consideration to this question. . . .

We have, then, the case of equal equities, at the time the gravel was taken — of a senior and junior equitable estate; equal, in that they originated in the same way, by contract of purchase from a common vendor; and both equitable, because of vagueness and uncertainty in the instrument purporting to convey the title, — both vendees acting in good faith, and paying a valuable consideration. In such case, the rule applies, that the party who has the prior equity in point of time, is entitled to the like priority in point of right. *Qui prior est in tempore, potior est in jure.*

The acquisition of the legal estate by the plaintiff, after notice of the equity of the railroad company, can not avail to defeat or override such equity. Whatever may be the conflict of judicial opinion, and however irreconcilable, the rule is settled in this State — has become a rule of property, which we are not at liberty to disturb — that a court of equity “will not permit the party, having the subsequent equity, to protect himself by obtaining a conveyance of the legal title, after he has either actual or constructive notice of the prior equity.” *Flash v. Ravisies*, 32 Ala. 451. In 2 Pom. on Eq. Jur. (§756), the author illustrates the rule as follows: “If an owner of land gives an agreement to convey to A., who pays all, or part of the price, and afterwards gives a second agreement to convey to B., who enters into the contract, and pays all, or part of the price, and without any notice of the prior claim of A., clearly B. would not have obtained an equitable advantage from the fact of his contract and payment without notice; A.’s interest would be of the same character and extent, and his priority of time would give him priority of right. To say that B., being thus inferior in equitable right, may, upon receiving notice of A.’s contract, obtain a conveyance from the owner, and thus establish a precedence over A., is to misapply the doctrine of *bona fide* purchaser, and to ignore a familiar principle of equity, that one who acquires a title with notice of a prior equity, takes it subject to that equity.”

The gravel was taken from the place designated by the vendor prior to and at the time of the execution of the deed, and under-

stood by the parties as the two acres of gravel intended to be conveyed. The legal title was in their common vendor, and the equities of the parties were equal. The South and North Alabama Railroad Company, under whom the defendant claims, having the senior equity, had the superior right to the gravel, on which they can successfully defend an action of trover. On the undisputed facts, the affirmative charge in favor of the defendant should have been given.

Since the execution of the conveyance of January, 1884, the legal title has been, and is in the plaintiff; the equitable estate, in the defendant.

*Reversed and remanded.*¹

¹ By the great weight of authority a purchaser is not protected from a prior equity if he receives notice of it at any time before the conveyance is executed, even though he may have paid the purchase-money before notice. *Re Samuel Allen*, [1907] 1 Ch. 575; *Wenz v. Pastene*, 209 Mass. 359; *Grimstone v. Carter*, 3 Paige (N. Y.) 421; *Ames*, 288, 305; *Ames, Purchase for Value*, 1 Harv. L. Rev. 8, Lect. Leg. Hist. 261; *Pomeroy, Eq. Juris.*, secs. 683, 691; 21 Ann. Cas. 463. — ED.

But if a *cestui que trust*, or equitable mortgagee, or other equitable claimant, by words or conduct encourages the belief that the trustee or mortgagor is the absolute beneficial owner of the property, he will of course be estopped to assert the trust or mortgage against a subsequent equitable incumbrancer who has acted on the faith of such words or conduct. *Waldron v. Sloper*, 1 Drew. 193; *Rice v. Rice*, 2 Drew. 73; *Worthington v. German*, 16 W. R. 187; *Dowle v. Saunders*, 2 H. & M. 242; *Layard v. Maud*, L. R. 4 Eq. 397; *Hunter v. Walters*, L. R. 7 Ch. Ap. 75; L. R. 11 Eq. 292, s. c.; *Bickerton v. Walker*, 31 Ch. D. 151; *Farrand v. Yorkshire Co.*, 40 Ch. D. 182; *Stoner v. Brown*, 18 Ind. 464; *Besson v. Eveland*, 26 N. J. Eq. 468; *Wilson v. Hicks*, 40 Oh. St. 418. See also *Union Bank v. Kent*, 39 Ch. Div. 238; *Niven v. Belknap*, 2 Johns. 573; *Leach v. Ansbacher*, 55 Pa. 85. — AMES.

In *Lloyd's Banking Co. v. Jones*, 29 Ch. D. 221, the owner of land deposited title deeds with a bank as security for future overdrafts. Without having overdrawn his account he conveyed the land to a trustee who gave the bank no notice of the conveyance and carelessly allowed the bank to retain possession of the title deeds. The former owner then overdrew his account. It was held that the trustee was estopped by his negligence and that the equity of the bank was superior to that of the beneficiaries. See *Lloyd's Bank v. Bullock*, [1896] 2 Ch. 192; *Walker v. Linom*, [1907] 2 Ch. 104. But see *Capell v. Winter*, [1907] 2 Ch. 376. In *Jenkinson v. N. Y. Finance Co.*, 79 N. J. Eq. 247, 257, it is pointed out that representations by the trustee should not estop the *cestui que trust*.

MERRY v. ABNEY THE FATHER, ABNEY THE SON
AND KENDALL.

CHANCERY. 1663.

Freem. C. C. 151.

KENDALL contracted with the plaintiff to sell him certain lands in Leicestershire; after which Abney the father, living near those lands, in the behalf of Abney the son, a merchant in London, purchased those lands of Kendall, and had a conveyance from Kendall to Abney the son and his heirs. The plaintiff's bill was to be relieved from this contract with Kendall, and against the conveyance, and charged notice of this contract to both the Abneys. Abney the son pleaded himself a purchaser *bona fide*, upon a valuable consideration, without notice of Kendall's contract with the plaintiff, and without any trust for his father.

CUR': Notice to the father, who transacted, is notice to the son, and shall affect him; so notice of a dormant incumbrance to one, who purchaseth for another, is notice to the purchaser; and accordingly this case was decreed at the hearing, viz. that they should convey to Merry the plaintiff, it appearing at the hearing, that Abney the father had notice of Merry's contract before he purchased for his son.¹

BOVEY v. SMITH.

CHANCERY. 1682.

1 Vern. 60.

A TRUSTEE having sold the land to a stranger, that had no notice of the trust, and a fine with proclamations and five years past, the trustee afterwards, for valuable consideration really paid, purchases these lands again of the vendee. And it was

¹ See *Wenz v. Pastene*, 209 Mass. 359; *H. C. Girard Co. v. Lamoureux*, 227 Mass. 277; *Scott v. Scott*, 2 N. Y. App. Div. 240.

But if one purchases property and takes title in the name of another and neither has notice of a prior equity, the prior equity is cut off. See *Kenicott v. Supervisors*, 16 Wall (U. S.) 452; *New Orleans etc. Co. v. Montgomery*, 95 U. S. 16; *Willis v. Henderson*, 5 Ill. 13; *Stokes v. Riley*, 121 Ill. 166. See *Ames*, 286n. But cf. *Paul v. McPherrin*, 48 Colo. 522.

decreed by the LORD CHANCELLOR [NOTTINGHAM], with the concurring opinion of the LORD CHIEF JUSTICE NORTH, that the trustee, notwithstanding the fine, proclamations, and non-claim for five years, should stand seized in trust as at first, as if the land had never been sold, nor any fine levied.¹

EYRE v. BURMESTER.

HOUSE OF LORDS. 1862.

. 10 H. L. Cas. 90.

THE LORD CHANCELLOR [WESTBURY].² My Lords, the facts material for the decision of this appeal are few, and may be shortly stated. In October, 1854, the late Mr. John Sadleir made a mortgage to the appellant, Mr. Eyre, of certain estates in Ireland, to secure the payment by Sadleir to Eyre of considerable sums of money. Afterwards, and in September, 1855, John Sadleir, being very largely indebted to the London

¹ *Kennedy v. Daly*, 1 Sch. & Lef. 379; *Re Stapleford Co.*, 14 Ch. D. 432, 445 (*semble*); *Huling v. Abbott*, 86 Cal. 423; *Bourguin v. Bourguin*, 120 Ga. 115 (trustee allowed property to be sold for taxes); *Johnson v. Gibson*, 116 Ill. 294; *Trentman v. Eldridge*, 98 Ind. 525, 528; *Bailey v. Binney*, 61 Me. 361; *Frost v. Frost*, 63 Me. 399; *Williams v. Williams*, 118 Mich. 477; *Allison v. Hagan*, 12 Nev. 38; *Brophy Co. v. Brophy Co.*, 15 Nev. 101; *Schutt v. Large*, 6 Barb. (N. Y.) 373; *Clark v. McNeal*, 113 N. Y. 287; *Church v. Ruland*, 64 Pa. 432; *Armstrong v. Campbell*, 3 Yerg. (Tenn.) 201; *Yost v. Critcher*, 112 Va. 870; *Troy Bank v. Wilcox*, 24 Wis. 671; *Ely v. Wilcox*, 26 Wis. 91, *accord*. See Ames, 287; 1 Ames, Cases on Bills and Notes, 691, 692, n. 3; Perry, Trusts, sec. 830; Pomeroy, Eq. Juris., sec. 754. Compare the cases where a mortgagor acquires an outstanding title. *Tully v. Taylor*, 84 N. J. Eq. 459, L. R. A. 1918B 731.

If a purchaser for value without notice of equities conveys to any one else, though a purchaser with notice or a donee, the trust does not revive. *East-Greensted's Case*, Duke, Char. Uses 64; *Colefield's Case*, *ibid.* 68; *Wilkes v. Spooner*, [1911] 2 K. B. 473; *English v. Lindley*, 194 Ill. 181; Ames, 286; Perry, Trusts, sec. 830; Pomeroy, Eq. Juris., sec. 754. — Ed.

But an innocent grantee of a fraudulent grantor is guilty of no wrong in parting with the property if he is still ignorant of the equity of the defrauded person. *Bonesteel v. Bonesteel*, 30 Wis. 516; [*Holly v. Missionary Society*, 180 U. S. 280.] He is bound, it is true, to account to the defrauded person for so much as, but no more than, he has received (*Robes v. Bent*, Moo. 552), in exchange for the property. But, on the other hand, if he reacquires the property from an innocent purchaser for value, he may keep it. *Mast v. Henry*, 65 Iowa 193. — Ames.

² The statement of facts and concurring opinions of Lord Cranworth and Lord Chelmsford are omitted. Lord Kingsdown also concurred.

and County Joint Stock Bank, conveyed these estates and other large estates in Ireland to the respondents, who represent the bank, to secure such debt and further advances then made by the bank to Sadleir. No mention was made by Sadleir to the respondents of the fact of the mortgage to Eyre; but the estates in question were conveyed by Sadleir to them as free from any encumbrance. Before this mortgage to the bank was completed by registration of the deeds in Ireland, the fact of Eyre's mortgage was discovered by the agents of the respondents, who therefore refused to allow the arrangement between Sadleir and themselves to remain unless he obtained a release from Eyre of the estates in question. This Sadleir engaged to do; and he prevailed upon Eyre to execute a deed of reconveyance to Sadleir himself of these estates, in consideration of Eyre's receiving from Sadleir other securities of equal or greater value. The substituted securities consisted chiefly of a large number of shares in the Royal Swedish Railway, and of a promissory note for 12,000*l.*, expressed to be made and signed by Mr. Dargan. But the shares were fictitious, having been fabricated by John Sadleir for the purpose, and the promissory note was a forgery. An actual fraud of a gross and criminal character was therefore committed by Sadleir upon Eyre; and by means of that fraud the release of Eyre's mortgage was obtained.

The release was contained in a deed dated the 5th, but executed on the 13th of October, 1855. By it Mr. Eyre reconveyed, granted, released, and confirmed unto John Sadleir the estates comprised in the mortgage deed of October, 1854. No consideration for this reconveyance is expressed in the deed itself, but the real agreement between the parties is contained in a contemporaneous agreement of the 6th of October, 1855.

After the execution of this deed of reconveyance to John Sadleir no further conveyance was made by Sadleir to the respondents. They were assured of the fact of the reconveyance, and the mortgage was either completed or allowed to continue. The estate so reconveyed by Eyre remained in John Sadleir until he committed suicide in the month of February, 1856. On that event, the fraud of Sadleir was discovered.

These estates have been since sold by an order of the Encumbered Estates Court in Ireland. With respect to the proceeds of that sale, a contest has arisen between Eyre and the London and County Bank; Eyre claims the benefit of his original mortgage, and insists that the reconveyance is void for fraud.

The bank directors claim the benefit of the reconveyance as purchasers for valuable consideration, without notice of the fraud committed by Sadleir on Eyre, and on that ground the court below has given judgment in their favour.

A purchaser for valuable consideration without notice will not be deprived by a court of equity of any advantage at law which he has fairly obtained for his protection. But in the present case the estate reconveyed by Eyre, remained in Sadleir, and was never conveyed by Sadleir to the bank. In answer to this objection, the respondents insist on the estoppel created by the previous conveyance. This answer would be good as against Sadleir and all claiming under him. The estoppel created by the antecedent contract and conveyance by Sadleir would bind parties and privies, that is, Sadleir and those claiming under him. But the claim of Eyre is against Sadleir by paramount right, to recover the estate of which Eyre had been deprived by fraud, and Sadleir acquired no interest to feed his prior contract by virtue of that fraudulent transaction.

It is urged by the respondents that the reconveyance when made by Eyre enabled Sadleir to obtain money from the bank, and that the mortgage was completed on the faith of the reconveyance. The evidence does not appear to me to prove either of these positions. But granting that it does, the reconveyance was to Sadleir and was obtained by him by fraud and covin. There was no contract or direct communication between the respondents and Eyre, who acted with perfect *bona fides*. The respondents left Sadleir to obtain the reconveyance, and they can claim the benefit of it only under Sadleir, whose act they must take as it is. If (which is not proved) they had advanced money to Sadleir on the faith of the release and their actual possession of it, but without taking a conveyance, they might have had a lien on the deed itself; but their interest in the estate being equitable only would still, in my opinion, have been subject to the superior equity of Eyre. Whilst the estate remained in Sadleir, so long was it liable to be pursued and recovered by Eyre. But there is no sufficient proof of any such advance by the bank; and the only foundation of the bank's claim is the mortgage by Sadleir prior to the deed of reconveyance. That mortgage and contract would bind any interest subsequently acquired by Sadleir. But under the reconveyance he obtained none; for, as between Sadleir and Eyre, the latter was still the owner, and might at any time

during the life of Sadleir, by bill in equity have set aside the release, and obtained a reconveyance of the estate, and an interim injunction to restrain any alienation of it by Sadleir. This equitable title still remains unimpaired, and ought to be preferred to any claim by the bank.

I therefore advise your Lordships that the orders of the court below be reversed, and that it be declared that the claim of the appellant to priority in respect of his mortgage, ought to have been allowed; and that the case be remitted, with that declaration, to the Landed Estates Court. If the appellant has obtained any additional security under the agreement of the 6th October, 1855, not comprised in his original mortgage, that must be given up or accounted for to the bank.¹

LONDON AND COUNTY BANKING COMPANY,
LIMITED *v.* LONDON AND RIVER PLATE
BANK, LIMITED.

COURT OF APPEAL. 1888.

21 Q. B. D. 535.

THIS action was brought by the plaintiffs to recover from the defendants 9000*l.* Unified Egyptian Bonds, 2000*l.* Egyptian Preference Government Bonds, 300 shares in the Pennsylvania Railway Company, and 2400*l.* New South Wales Bonds. It came on for trial before Manisty, J., and a special jury, but was referred to a special referee to report, and was reserved for further consideration on his report, with power to draw inferences of fact.

From the report of the referee the following facts are taken: —

The plaintiffs were the London and County Banking Company, Limited, Robert Henry Capps, and John Record; but for

¹ *Heath v. Crealock*, 10 Ch. 22; *Kelley v. Jenness*, 50 Me. 455; *Sinclair v. Jackson*, 8 Cow. 543, 587; *Jackson v. Hoffman*, 9 Cow. 271; *Burchard v. Hubbard*, 11 Oh. 316; *Buckingham v. Hanna*, 2 Oh. St. 551; *Gregory v. Peoples*, 80 Va. 355, *accord.* See also *Hawkins v. Harlan*, 68 Cal. 236; *Elder v. Derby*, 98 Ill. 228; *Chew v. Barnett*, 11 S. & R. (Pa.) 389.

If a mortgage covers after-acquired property, and the mortgagor subsequently acquires property subject to an equity, the mortgagee takes subject to the equity. *Bear Lake etc. Co. v. Garland*, 164 U. S. 1; *Williamson v. N. J. Southern Ry. Co.*, 28 N. J. Eq. 277, 29 N. J. Eq. 311; *Central T. Co. v. West India Imp. Co.*, 169 N. Y. 314. See *Jones, Mortgages*, 7 ed., sec. 158.

the purposes of this report the case may be treated as if Capps were the sole plaintiff.

A person of the name of Warden was secretary and manager of the defendant company, and had access to the securities deposited by customers with them. He had, in 1882, incurred a loss in Stock Exchange speculations conducted for him by John Davis Watters, a stockbroker not a member of the Stock Exchange. The dealings of Watters were necessarily conducted by him through members of the Stock Exchange, of whom Capps was one. Record was Capps' manager. To cover the loss above mentioned, Warden handed to Watters securities belonging to the defendant company. In January, 1883, Watters consulted Warden about a loss of his own, and eventually Warden handed him securities belonging to the bank to cover that loss. From that time forward Warden and Watters were continually engaged in large speculative transactions on the Stock Exchange. Before each fortnightly settling-day Watters used to tell Warden what amount of securities he would require, and whatever he wanted Warden abstracted from the bank and gave to him.

The securities thus abstracted were from time to time wanted by Warden at the bank for various purposes — for example, to cut off coupons. They were in particular wanted by Warden at the beginning of October, 1883, to exhibit them at an audit of stocks and shares on which the bank had advanced money to their customers. October 1, 1883, was fixed as the audit-day, and a list was prepared for audit by the transfer clerk. Warden gave Watters a list of the securities which had been abstracted and would be required for the audit, and Watters undertook to redeem them. Among these were securities which had been deposited by Watters with Capps in the course of the business transactions between them, and Watters accordingly applied to Capps for them, and handed him a cheque for 13,000*l.* on his own bankers. Capps thereupon obtained the securities to recover which this action was brought from different banks with which he had deposited them, and handed them to Watters, who passed them on to Warden, by whom they were placed among the securities at the defendant bank, and exhibited to the auditors. Watters, however, failed to redeem all the securities abstracted by Warden, and this led to the discovery of the fraud of Warden, and ultimately both he and Watters were tried and convicted in respect of their dealings with property

of the defendants other than the securities in question. Capps and Record received the securities without any knowledge of the fraud of either Warden or Watters, and were holders of them for value. Watters, when he gave the cheque for 13,000*l.* to Capps, had only a small balance at his bank, and he intended to meet the cheque by obtaining from Warden either the same securities or other securities which he expected Warden would be able to abstract from the defendant bank, and hand over to him. The cheque was dishonoured but Watters before the discovery of his being implicated in the fraud had paid Capps two sums, amounting to about 1700*l.*, on account of his indebtedness.

On further consideration, before Manisty, J., questions arose as to the negotiability of the Pennsylvania Railway shares, as to the exact identity of certain of the restored bonds with those stolen from the bank, and as to the right of Capps to disaffirm the transfer of the securities to Watters on the ground that it was procured by fraud, but it is not necessary for the purposes of this report to go into these questions. The learned judge gave judgment for the defendants on the ground that they were holders of the securities for valuable consideration, 20 Q. B. D. 232.

The plaintiffs appealed.

LINDLEY, L. J.¹ My brother Bowen desires me to say that he has read and agrees with the following judgment.

In this case the plaintiffs unquestionably acquired the property in these bonds, and if the plaintiffs had continued to hold them the defendants could not have recovered them even if the defendants had prosecuted Warden, and he had been convicted of stealing the bonds from the defendants. See 24 & 25 Vict. c. 96, s. 100, by which stolen negotiable securities in the hands of a *bond fide* holder for value are made an exception to the general rule which applies to the restoration of stolen property on the conviction of the thief.

But the plaintiffs lost possession of the bonds; the plaintiffs were induced to part with them by a fraud; and the bonds were restored to the possession of the defendants by the thief who had stolen them from the defendants in the first instance. The plaintiffs having thus lost possession of the bonds seek to recover them from the defendants; and the question is whether the plaintiffs are entitled so to do.

¹ The concurring opinion of Lord Esher, M. R., is omitted.

It is remarkable that this question should be so free from all direct authority as it in fact is. The question has not apparently ever called for decision before. It is absolutely new and must be decided on principle.

The plaintiffs contend that although the defendants are *bond fide* holders of the bonds, yet the defendants are not holders of them for value; that the defendants have not acquired them for value since the plaintiffs were induced by fraud to part with them; and that consequently the property in the bonds which had certainly become vested in the plaintiffs has never been divested from them.

In order to deal with this argument it is necessary to consider the legal effect of the restoration of the bonds to the defendants by Warden, who had previously stolen them from the defendants.

The legal consequences of the theft were: 1, to render Warden liable to conviction for a criminal offence: 2, to render him liable in a civil action to restore the bonds or pay their value to the defendants. In addition to his criminal responsibility he was under a civil obligation to the defendants to restore the bonds or their value to them. The existence of this civil obligation affords in my opinion the clue to the solution of the problem which has to be solved.

When Warden restored the bonds which he had stolen, he was doing no more than he was bound to the defendants to do; he was discharging, or, at all events, partly discharging, his obligation to them, and if the defendants chose to accept the bonds in such discharge his obligation to the defendants would have been extinguished, if not wholly, at least to the extent of the value of the bonds restored. In the case supposed, the defendants clearly would have been *bond fide* holders of the bonds for value; the value being the extinction of Warden's obligation to themselves; and in the case supposed, the defendants would have acquired a good title as against the plaintiffs.

But then it is said that the defendants did not in fact accept the bonds when they were restored in discharge of Warden's obligations, inasmuch as the defendants did not know that the bonds ever had been stolen from them, and did not know that Warden was under any obligation in respect of them, and did not know of their restoration by him.

All this is perfectly true, but is not in my opinion decisive against the defendants. Their acceptance of the bonds in dis-

charge of Warden's obligation, which existed in truth although the defendants did not know it, may, and in my opinion ought to be presumed in the absence of evidence to the contrary.

This presumption is, I think, warranted by authority, for although the exact point has not been decided, an analogous point has. It was settled as long ago as the time of Lord Coke that the acceptance of a gift by a donee is to be presumed until his dissent is signified, even though the donee is not aware of the gift (*Butler and Baker's Case*, 3 Rep. 25 a), and this doctrine has been applied even as against the Crown, and so as to defeat a title accruing to it before actual assent: *Smith v. Wheeler*, 1 Vent. 128, referred to at length in *Small v. Marwood*, 9 B. & C. 300, at p. 306, and in *Siggers v. Evans*, 5 El. & Bl. 367, at p. 382. In the last-mentioned case the presumption was held to apply to a gift of an onerous nature; and in *Standing v. Bowring*, 31 Ch. D. 282, the presumption was also held to apply to a gift which the donor desired to revoke before the donee knew that it had been made. The presumption of acceptance in such cases is artificial, but is founded on human nature; a man may be fairly presumed to assent to that to which he in all probability would assent if the opportunity of assenting were given him. Taking these decisions and this reasoning as guides, I am of opinion that in the absence of evidence to the contrary the defendants ought in point of law to be presumed to have accepted from Warden the bonds which he handed over to them in discharge of his obligation to them, which obligation existed to his knowledge although not to theirs. It would be contrary to human nature to suppose that the defendants would not have kept the bonds if they had known of their theft from themselves, and of their restoration; and we know as a fact that the defendants have insisted on their right to retain the bonds ever since they discovered the theft.

If the above reasoning be correct it follows that as soon as the bonds were restored the presumption of acceptance arose, subject to be rebutted by evidence of non-acceptance; and there being no evidence of non-acceptance, but on the contrary proof of acceptance at a later date, the presumption ought to prevail. Acceptance of the bonds at the date of their restoration being thus arrived at, satisfaction to some extent, if not in full, of the thief's civil obligation follows, and the defendants' position as *bonâ fide* holders for value becomes unassailable.

It is obvious that this reasoning applies not only to the bonds

originally stolen and afterwards restored, but also to the 2000*l.* preference bonds, which though never stolen from the defendants were given to them in substitution for bonds which were. It is not the restoration of the stolen bonds which is the important point: it is the handing over to the defendants of negotiable instruments in performance of a civil obligation which is the turning point of the case. Such a handing over is not a gift; the person to whom they are handed over is not a donee. A person from whom property is stolen has a right to demand restitution from the thief, whether the person robbed knows of the theft or not; and this right and the satisfaction of it by restitution places him in the position of a holder for value, and not in the position of a gratuitous donee. Whether he can retain what he has got as against other persons than the thief depends primarily on the nature of the property handed to him. If such property is a negotiable instrument he can, unless at the time of the handing over he has notice that it belongs to some third party. If the property handed over is not a negotiable instrument other considerations arise; but the present appeal relates only to negotiable securities, and does not involve the necessity of dealing with other kinds of property. I consequently forbear from pursuing this matter further.

My judgment is based upon the ground that on October 1 the defendants became holders for value of the bonds in question within the meaning of the doctrine laid down in *Miller v. Race*, 1 Sm. L. C. 9th ed. 491, and became such holders *bonâ fide*, and without notice of the plaintiff's title or of any fraud upon them.

This being so, it becomes unnecessary to examine, and I express no opinion upon, the other points alluded to by Manisty, J., and discussed by counsel before us.

*Appeal dismissed.*¹

¹ See *Thorndike v. Hunt*, 3 DeG. & J. 563; *Taylor v. Blakelock*, 32 Ch. D. 560; *Colonial Bk. v. Hepworth*, 36 Ch. D. 36; *State Bk. v. U. S.*, 114 U. S. 401. But see *Voss v. Chamberlain*, 139 Iowa 569.

In *Nash v. De Freville*, [1900] 2 Q. B. 72, the defendant gave three promissory notes to the payee and subsequently two other notes in substitution for the first three and to cover further advances. All the notes were given on the understanding that they should not be negotiated. The payee indorsed all five notes to the plaintiffs. Thereafter the defendant paid the payee the amount due on the last two notes, not knowing that they had been indorsed and not asking for their surrender. Subsequently the payee obtained the five notes from the plaintiffs by fraud and handed them to the defendant.

NEWELL *v.* HADLEY.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1910.

206 Mass. 335.

LORING, J.¹ This is a bill in equity brought by the surviving trustee under the will of Andrew H. Newell and the beneficiaries of that trust against the trustees and beneficiaries under the will of James B. Pickett.

In November, 1901, one Charles F. Berry was the active trustee of each of these two trusts. His co-trustee in the Newell trust was Andrew Newell, whose residence was in Australia; and his co-trustee in the Pickett trust was Thomas E. Major, whose residence was in Ohio.

On November 15, 1901, Berry found himself in immediate need of \$2,000 to be sent to the west in order to carry through a private speculation of his own. The Pickett trust was in need, but not in immediate need, of money for taxes and mortgage interest due in respect of a building or buildings owned and maintained by that trust. The need of money for taxes and mortgage interest on the part of the Pickett trust came from the fact that Berry had previously stolen money from that trust exceeding in amount the money needed for these purposes.

It was held that the plaintiffs might recover on all the notes. The court declined to apply *London & County Banking Co. v. London & River Plate Bk.*

If the purchase price of property is paid before the title is transferred, it would seem that the purchaser is a purchaser for value, even in jurisdictions in which the surrender of an antecedent debt is not held to be value; and if the purchaser had no notice of a prior equity at the time when the conveyance was made he should take free and clear of the equity. *Ratliffe v. Barnard*, 6 Ch. 652; *Miller & Co. v. Boykin*, 70 Ala. 469; *People v. Swift*, 96 Cal. 165; *Gibson v. Lenhart*, 101 Pa. 522. See *Osgood v. Thompson Bk.*, 30 Conn. 27.

But in *Barnard v. Campbell*, 55 N. Y. 456, 58 N. Y. 73, it was held that where one agreed to sell a number of bags of seed and did not own any seed at the time but later acquired some by fraud and delivered it to the purchaser, the buyer was not allowed to keep although he had no notice of the fraud. It was intimated that the result would have been different if the vendors had had legal title at the time they made the contract to sell. To a similar effect, see *Central T. Co. v. West India Imp. Co.*, 169 N. Y. 314.

See Ames, *The Doctrine of Price v. Neal*, 4 Harv. L. Rev. 297, Lect. Leg. Hist. 270; Woodward, *Quasi Contracts*, secs. 72, 75.

¹ A part of the opinion and a dissenting opinion of Knowlton, C. J., are omitted.

Under these circumstances Berry, on November 15, took to certain brokers a certificate for fifty-one shares of stock, the property of the Newell trust, and instructed them to sell the shares, and asked for an advance of \$11,000 on account. He received from the brokers their check for \$11,000, payable to "C. F. Berry, trustee." Berry and Major, trustees of the Pickett trust, had a deposit account with the Old Colony Trust Company, on which checks could be drawn by either trustee. Berry indorsed the check for \$11,000 and deposited it to the credit of this account. There was at that time the sum of \$1,380.44 to the credit of that account. The deposit of the check for \$11,000 seems to have been made after banking hours on the fifteenth, and for that reason was credited on the sixteenth, of November. On the afternoon of the fifteenth Berry drew a check for \$2,000 on this account, took it to the trust company and obtained for it two drafts on New York, each for \$1,000, which he sent to the west to carry through his personal speculation. Thereafter he drew twenty-one other checks on the account. The last check, for \$63, was dated December 16, 1901, and resulted in the account being overdrawn to the amount, as stated in the reservation, of \$8.88, but which appears to have been \$18.88. Four of the twenty-two checks thus drawn, amounting in the aggregate to \$3,864.85, were used by Berry for his personal expenses; eleven, amounting in the aggregate to \$7,903.14, were used by Berry in paying on account of the Pickett trust taxes and mortgage interest due on the buildings of the Pickett trust, wages due to the scrubwomen and elevator boys of these buildings, and bills for lighting, steam heating and insurance on these buildings; six checks, amounting in the aggregate to \$568.33, were used in payments to the beneficiaries of the Pickett trust of income due to them; and the last check, for \$63, of which \$18.88 was an overdraft, was used in paying to Mr. Major, Berry's co-trustee in the Pickett trust, the commissions due to him for services as trustee for that trust. That is to say, on the last check \$44.12 was drawn out of the \$11,000. Berry testified that he had no personal bank account at that time, and that he deposited the check for \$11,000 with the Old Colony Trust Company to the credit of Mr. Major and himself, trustees of the Pickett trust, because that "was the handiest place," by which we understand him to have meant that depositing the check for \$11,000 to the credit of the account of Major and himself as trustees of the Pickett trust was the most con-

venient way for him to cash it. He further testified that when he made this deposit "it did not enter my [his] head" to make the deposit as payment of his debt to that trust. At that time he knew that he was largely in debt to the Pickett trust, and on an examination made during the hearing before the single justice he found that the sum then due from him to the Pickett trust amounted to \$11,185.50 gross, or, deducting a sum equal to the usual commissions, to \$9,515.50. But he testified that at the time (to wit, on November 15, 1901) he did not know the exact amount of that debt. In March, 1902, Berry was again in debt to the Pickett trust to the amount of \$8,042.33. From some source or sources not mentioned in the reservation he paid up this amount on March 26 and rendered an account on March 27, 1902, which was allowed. Berry resigned his position of trustee of the Pickett trust in March, 1903, and was succeeded by the defendant Hadley. [Berry was removed as trustee of the Newell trust by order of the Probate Court on April 8, 1905.]

The plaintiffs' first contention is that the defendants are liable for the whole \$11,000. In our opinion that is not so. Berry did not in fact intend to make the \$11,000 the property of the Pickett trust by borrowing that money in behalf of that trust, or by paying with it his debt to the Pickett trust. All that he intended to do was to put the \$11,000 in the name of himself and his co-trustee in the Pickett trust as the "handiest" way of cashing the \$11,000 check. The \$11,000 while it was on deposit in the Old Colony Trust Company belonged in equity to the Newell trust as the property into which its \$11,000 had been converted. The whole \$11,000 had been all drawn out by Berry before the defendants or any of them knew anything about it. A defendant is not liable to repay to the owner the amount of a stolen check fraudulently put to his (the defendant's) credit to enable the thief to collect the amount of it when the proceeds have been drawn out by the thief before the defendant knows anything about the matter.

It follows that the defendants are not liable for the \$3,864.85 applied by Berry for his own use.

The plaintiffs' second contention is that so far as the \$11,000 was applied in discharge of debts owed by the Pickett trust the Newell trust has a right of recovery.

The amount drawn out of this bank account to pay debts owed by the Pickett trust is (as we have said) \$7,903.14. But

there was the sum of \$1,380.44 to the credit of the Pickett trust in this bank account when the \$11,000 was deposited. There is a question therefore whether the amount of the plaintiffs' \$11,000 used in paying the defendants' debts is \$7,903.14 or \$7,903.14 less \$1,380.44, that is to say \$6,522.70. As matter of convenience we will now assume that it is the smaller amount (namely, \$6,522.70) and we will deal with that matter later on.

On the footing that the amount paid out for debts is \$6,522.70, the amount paid out for mortgage interest and taxes was \$6,045.19 and for unsecured debts due from the Pickett trust \$477.51.

It was decided in *Foot v. Cotting*, 195 Mass. 55, that under the circumstances of the case at bar the Newell trust has no remedy at law even for the money belonging to it used in paying taxes on the land of the Pickett trust. But it was suggested in that case, at page 63, that to the extent to which one trust has been benefited through the payment out of its money of the taxes on the land of the other (under circumstances such as those in the case at bar) there might be a remedy in equity on the principle of subrogation, citing *Webber Lumber Co. v. Shaw*, 189 Mass. 366. For a recent case which lends support to that suggestion, see the first case reported under the title of *Title Guarantee & Trust Co. v. Haven*, 196 N. Y. 487. It would seem that on this principle the plaintiffs would be entitled to a decree (1) for a charge upon the defendants' land to the amount of the tax paid with their (the plaintiffs') money and (2) for a charge, except as against the mortgagee, upon their (the defendants') land to the amount of the mortgage interest paid with their (the plaintiffs') money. But it is not necessary to pursue this further because we are of opinion that the plaintiffs are entitled to a personal decree against the defendants for simple debts paid with their (the plaintiffs') money, and that they are entitled on the same ground to a personal decree for payments of taxes and mortgage interest made with their money.

It has long been the settled law of England that where the money of A has been used in extinguishing the legal liabilities of B (although no debt or other obligation is created thereby at law), equity will let A enforce against B the obligations of B's creditors paid off by his (A's) money. The principle was applied in *Harris v. Lee*, 1 P. Wms. 482, where a wife borrowed money to pay for necessities and afterwards the husband died having devised land in trust for the payment of his debts. Although

a husband is liable for his wife's debts incurred for necessities, he is not liable for money borrowed by his wife to be used in paying for necessities. That was admitted in *Harris v. Lee*, *ubi supra*, and *Knox v. Bushell*, 3 C. B. (N. S.) 334, is a decision to that effect. Not only was that decided in *Knox v. Bushell*, but it was also decided there that in such a case there is no remedy on the common counts or in any other way at law. It was held in *Harris v. Lee* that the plaintiff (whose loan to the wife was void) had a right to be paid the sums which were due to the creditor who had furnished necessities to the wife and who had been paid out of the money furnished the wife under the void loan. The principle was applied also in case of money borrowed by an infant, which was used to buy necessities. *Marlow v. Pitfeild*, 1 P. Wms. 558. It was pointed out in *Marlow v. Pitfeild* that there is no liability at law in such a case; and *Darby v. Boucher*, 1 Salk. 279, is a decision to that effect. The most common application of this principle has been where money borrowed by a corporation which had no power to borrow money has been used in paying its debts. *In re Cork & Youghal Railway*, L. R. 4 Ch. 748. *Blackburn Building Society v. Cunliffe, Brooks & Co.*, 22 Ch. D. 61. *In re Wrexham, Mold & Connah's Quay Railway*, [1899] 1 Ch. 205; S. C. on appeal, *Ibid.* 440. Lastly, this principle was applied in 1906 in a case where the London agent of ship and insurance brokers carrying on business in Liverpool (who had withdrawn money for his own account without right) without authority borrowed money in behalf of his principals and applied it in payment of the expenses of the principal's London business. *Bannatyne v. MacIver*, [1906] 1 K. B. 103.

The case at bar is a stronger case for the application of this principle than any of these mentioned above in which it has been applied. The plaintiffs' money in the case at bar was stolen from them without fault on their part, not lent by them under an invalid contract. Since Berry had the legal right to the custody of the property in which the plaintiffs had the beneficial interest, the plaintiffs were not at fault in letting it remain in his possession. On the other hand it might well have been held that the persons who lent the money in the English cases *ubi supra* were chargeable with knowledge of the invalidity of the loans. See in that connection *Bannatyne v. MacIver*, [1906] 1 K. B. 103, 109.

There are suggestions in some of these cases that the doctrine

on which they rest is that in such cases the lender is subrogated to the rights of the creditors. In others it is suggested that in these cases the true owner of the money is allowed to trace his property into the benefit enuring to the defendant, on the principle on which an owner can in equity trace his property into any form into which it has been wrongfully converted. And in others, that this is an independent ground of equitable relief. It is not necessary to determine whether these principles are not in their essence the same or what is the most accurate way of stating the principle on which these cases rest, for we are of opinion that they were well decided, and that the principle on which they rest is well founded and should be adopted by us.

The question, therefore, on which the case at bar depends is whether the money, with which the debts due from the defendants stated above were paid, was the plaintiffs' money. . . .

We have already held that the \$11,000 did not become the money of the defendants when it was deposited by Berry to the credit of the defendants' trustees in the Old Colony Trust Company, without their knowledge, to enable him to complete his theft.

But when Berry drew out \$6,522.70 of the \$11,000 belonging to the Newell trust on deposit in the Old Colony Trust Company and applied it in payment of debts due from the Pickett trust, either he directly paid the defendants' debts with the plaintiffs' money or he in legal contemplation undertook to pay his debt to the Pickett trust with the plaintiffs' money, and used the money so paid to that trust in paying its debts.

If he is to be considered to have paid the defendants' debts directly with the plaintiffs' money, the case at bar comes within the principle of the English cases referred to above.

And the result is the same if in legal contemplation Berry is to be considered to have undertaken to pay his debt to the defendants with the plaintiffs' money and then to have used that money in paying the defendants' debts. This attempted repayment by Berry of his debt to the Pickett trust did not make the money so paid to them their money. It was the plaintiffs' money in the beginning, it remained the plaintiffs' money while it was on deposit in the Old Colony Trust Company, and it did not cease to be the plaintiffs' money when Berry used it in paying his debt to the trust of which he was one of two trustees, because he and he alone acted for the Pickett trust in receiving the attempted payment.

The general rule is that an assignee of money gets no better title than the assignor of it had. But the assignee does get a better title than his assignor had if he is a purchaser for value in good faith and without notice.

Apart from authority it would be a strange doctrine if it were law that the true owner of money lost his title to it by a thief who stole it undertaking to use it in paying a debt owed by the thief to another, when the thief and no one else received for that other the payment so made. It is not conceivable that such a manipulation by a thief of stolen money should result in the true owner's losing his title and the creditor of the thief getting a better title to the money than the thief had to it. . . .

Adopting the words of this court in *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 274: It is not as if Berry, after stealing \$11,185.50, or \$9,515.50, from the defendant trust (as he did) had called the innocent trustee or the beneficiaries of that trust "together and informed them of his indebtedness and of his desire to make a payment on account, and had then paid over to them the money [this \$6,522.70] as money coming from himself, and they had received it without knowledge or suspicion that it had been stolen, and given him credit for it as part payment." In that case the Pickett trust would have been a purchaser without notice within the doctrine invoked by the defendant in the case at bar.

That is not what took place. When Berry repaid in part the money stolen from the defendants by paying their debts with the \$6,522.70 stolen from the plaintiffs, Berry and Berry alone represented the defendants in receiving the \$6,522.70. They "must be deemed to have known what he knew; and" they "cannot retain the benefit of his act, without accepting the consequences of his knowledge." The defendants "cannot obtain greater rights from his act than if . . . [they] . . . did the thing itself, knowing what he knew," to quote again from *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 274.

But it is said that when this money was used in paying the defendants' debts there was a transaction in which Berry was not the only person on both sides. It is said that the creditors who were paid were on the other side of the transaction. The creditors who were paid were on the other side of a transaction. But the transaction in which the creditors were on the other side consisted in the payment of the debts owed by the defendants to them. In that transaction the creditors got a good

title to the money paid to them by Berry. But they took no part in the transaction by which Berry paid his debt to the defendants with money stolen from the plaintiffs. Berry and Berry alone was on both sides of that transaction.

In this connection it should be pointed out that there were payments made out of this \$11,000 to the beneficiaries of the defendant trust and to Berry's co-trustee. In receiving these payments the beneficiaries and the co-trustee did not act through Berry. They acted for themselves. They are *bona fide* purchasers without notice of the money so paid to them, and the plaintiffs have no claim for the \$612.45 (\$568.33 + \$44.12) so paid out.

But the defendants say that there was an accounting later on, and that they became purchasers for value without notice by virtue of that accounting within the doctrine recognized by this court in *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 279: "There is another class of cases where the same person has been trustee of two different funds, and has fraudulently transferred securities from one trust fund to the other. But in each case of this class which has been cited, there has been something in the nature of an accounting, and the trust fund which has received and has been entitled to retain the benefit has been partly or wholly represented either by the *cestuis que trust*, or by an innocent trustee representing them. *Thorndike v. Hunt*, 3 De G. & J. 563. *Taylor v. Blakelock*, 32 Ch. D. 560. *Case v. James*, 29 Beav. 512; S. C. on appeal, 3 De G., F. & J. 256."

But that is not so in the case at bar. The last of the \$11,000 was drawn out by Berry on December 16, 1901. It was drawn out by the check for \$63 which paid the innocent trustee the commissions due to him, and that check (as we have said) was an overdraft to the amount of \$18.88. The accounting here relied on by the defendants was three months later, in March, 1902.

The accounting in the case at bar was had not only after the repayment had become complete without anybody (but the thief) knowing of the repayment, but the accounting was had three months after the last penny of the money repaid had been expended without anybody but the thief knowing of the repayment and of the expenditure of the money repaid. There was no fund then in existence of which the defendants could become purchasers for value without notice. How that accounting could

be held to make the defendants purchasers without notice of money which had been paid out three months before has not been explained.

Apart from its effect upon the defendants being purchasers for value, the accounting which was had did not affect the rights of the parties. When the accounting was had in the case at bar the fact of the repayment was not stated or known to any one but Berry the thief. What happened was that four months after the repayment was made and three months after the money repaid had been expended, Berry filed an account in which he stated that he had received and properly paid out the income of the trust fund, and that account was assented to by the defendants on the footing that it was a true account. In a case where a thief steals money without his principal's knowledge, repays it with money stolen from some one else without his principal's knowledge, and pays out the other stolen money (so repaid by him) without his principal's knowledge, the rights of the parties are not changed by the fact that after the money so repaid has been paid out, the thief makes up a lying account in which no one of these facts is disclosed and the principal assents to it on the footing that it is a true account. Such an account is a fraud on the principal and can be set aside by him at any time. . . .

We are of opinion therefore that whatever view be taken of the transaction the \$6,522.70 used by Berry in paying the defendants' debts was the plaintiffs' money.

The only other ground on which the defendants could be thought to have a better equity than the plaintiffs arises from the fact that the defendant trust had provided Berry with money to pay the debts paid by him with the money of the plaintiffs.

The fact that the defendants had put Berry in funds to pay the debts paid with the plaintiffs' money (in our opinion) does not bar them from the equity to which that gives rise. The first act done by Berry was to steal from the defendants \$11,185.50, or \$9,515.50, whichever is the true sum (as we have stated above). That made Berry the defendants' debtor for that sum. Then Berry repays to the defendants (Berry and Berry alone accepting the payment in behalf of the defendants) \$6,522.70, on account of this debt of \$11,185.50, or \$9,515.50 owed by him to the defendants. The \$6,522.70 so repaid did not become the defendants' money because Berry

acted for the defendants in receiving it. Then Berry uses this money so repaid to the defendants in paying the defendants' debts. The money used in paying the defendants' debts was the plaintiffs' money. Berry still owes the defendants the \$11,185.50, or \$9,519.50. That debt was not in part paid by Berry's manipulation of the \$6,522.70. It cannot be that in equity the defendants are to have both their claim against Berry for the \$11,185.50, or \$9,515.50, and the payment of their debts to the amount of \$6,522.70. Since Berry's manipulation of the \$6,522.70 did not pay his debt to the defendants (and we have seen that it did not), the fact that the occasion for Berry's stealing \$6,522.70 from the plaintiffs and using it in paying the defendants' debts was because he had stolen the funds provided by the defendants to pay these debts, does not affect the plaintiffs' equity growing out of the fact that it was their (the plaintiffs') money which in fact paid the defendants' debts, and that a benefit enures to the defendants from that fact.

As matter of authority the only case on the point that has come to our attention, (*Bannatyne v. MacIver*, [1906] 1. K. B. 103,) is in accord with this view of the law. The suit in *Bannatyne v. MacIver* was on a bill for 350*l.*, the amount of unauthorized borrowing of money made by the defendant's London agent (Hudson by name) at four different times. When the first money was borrowed the London business was short of funds without fault on Hudson's part. But subsequently to the first loan and before the other three had been made, the principals had "sent him [Hudson] considerable sums of money, more than sufficient to cover the liabilities of the branch, and rendering any borrowing by Hudson unnecessary," page 104. The necessity for the money borrowed on the last three occasions came from the fact that Hudson had withdrawn sums which he had no right to withdraw. How much of the 350*l.* constituting the four borrowings was attributable to the first, when Hudson had not wrongfully withdrawn money, and how much of it was attributable to the three other borrowings caused by Hudson's wrongful withdrawals does not appear. It was held that the plaintiff's equity to stand in the shoes of the creditors paid off with their money did not depend upon the state of the account between the defendants and Hudson. Romer, L. J., dealt directly with this part of the case in these words: "It [the state of account between the agent and the

principals] might be relevant if the plaintiff were seeking to enforce a different equity, that is, the right to stand in the shoes of the agent as against his principal."

It follows that the defendants have no superior equity with respect to the \$6,522.70 used in paying the debts of the defendants, and that the plaintiffs to that extent are entitled to be repaid by the defendants.

This brings us to the question which we referred to in the beginning of this opinion and which we then left undecided, to wit, How much of the \$7,903.14, paid in discharge of debts due from the Pickett trust was paid out of the \$11,000 stolen from the plaintiffs? The plaintiffs claim that the rule in Clayton's case, 1 Mer. 572, applies; and applying that rule, that the \$2,000 drawn by Berry on November 15 for his own use must be applied to the balance on deposit when the \$11,000 was deposited, so far as the amount of that balance (\$1,380.44) goes, and that \$619.56 only of that \$2,000 was paid out of the \$11,000. In other words, that when Berry took \$2,000 out of this account for his own use in the afternoon of November 15, he stole \$1,380.44 from the Pickett estate and \$619.56 only from the Newell trust. The defendants contend, however, that Berry stole this \$2,000 from the Newell trust and that the \$1,380.44 on deposit in the Pickett account must be taken to have been applied to the payment of the Pickett trust debts. If the contention of the defendants is right, the sum expended out of the \$11,000 in payment of the Pickett trust's debts amounts to \$6,522.70, as we have said.

We are of opinion that the contention of the defendants is correct, and that the rule in Clayton's case does not apply. The rule in Clayton's case is that as between two *cestuis que trust* the order of drawings on a bankrupt's bank account is the order of application. But when the fund drawn on is a mixed fund belonging to the defendant and his beneficiary, the order in which the drawings are made is not material, and money which could have been properly drawn out by the bankrupt will be appropriated accordingly. *Hewitt v. Hayes*, 205 Mass. 356. *In re Hallett's estate*, 13 Ch. D. 696. *In re Oatway*, [1903] 2 Ch. 356. The bank account here in question was not Berry's bank account but the bank account of the Pickett trust, and the \$11,000 put into that account was put in there primarily to enable Berry to get a draft for the sum of \$2,000 on his own account, and secondarily to pay taxes and mortgage interest

amounting to \$7,903.14, due from the Pickett trust and then overdue because of prior stealings by him from the Pickett trust. It was Berry's duty to use the \$1,380.44, so far as it went, in paying this \$7,903.14 due from the Pickett trust for taxes and mortgage interest; and under the rule in Hallett's case he must be taken to have done so without regard to the order in which the checks were drawn.

We are therefore of opinion that the plaintiffs are entitled to recover the several sums making up the amount of \$6,522.70, with interest at six per cent from the several dates on which they were respectively used in paying debts due from the defendants.

*Decree accordingly.*¹

SAUNDERS v. DEHEW.

CHANCERY. 1692.

2 Vern. 271.²

ANNE BAYLY, being possessed of a term for years, makes a voluntary settlement thereof, in trust for herself for life, remainder to her daughter Isabella Barnes for life, remainder to the children of Isabella, by Mr. Barnes, her then husband. Isabella, for 200*l.*, mortgages the lands in question to the plaintiff, who pretends he had no notice of the settlement; Isabella, in the mortgage deed, being called the daughter and heir of John Bayley. The plaintiff hearing of it gets an assignment of the term from the trustees.

Per Cur. Though a purchaser may buy in an incumbrance, or lay hold on any plank to protect himself, yet he shall not protect himself by the taking a conveyance from a trustee after he had notice of the trust, for by taking a conveyance with notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust. And the plaintiff's bill being brought against the children of Isabella to foreclose them, the court refused so to do, saying, if he might be suffered to protect himself, by thus getting in the legal estate, they would not carry it on by a decree in equity to foreclose.² . . .

¹ *Bremer v. Williams*, 210 Mass. 256, *accord*. See 25 Harv. L. Rev. 602.

On the question of imputing to a principal or *cestui que trust* knowledge of the agent or trustee who has a personal interest in the transaction, see *Pomeroy*, Eq. Juris., secs. 666-676; 29 L. R. A. (N. S.) 558.

² *Freem. C. C.* 123, s. c.

COCKES *v.* SHERMAN.

CHANCERY. 1676.

Freem. C. C. 13.

FIVE successive mortgagees of the same land; the fifth mortgagee buys in the three first mortgages, and then exhibits his bill against the mortgagor to exclude him of his equity of redemption, and hath the land decreed to him absolutely.

In this case it was held per FINCH, Chancellor,

1. That the fourth mortgagee had an equity of redemption, but yet he should not be let in to redeem unless he satisfied the fifth mortgage, which was subsequent to his, as well as the other three that were before it; for when a purchaser or mortgagee lays out his money *bona fide*, not having any notice of the incumbrances, he may fortify his estate and title as well as he can, and when he hath got a title in law in him, as here he hath by the precedent mortgages, this court will never take it away from him, without reimbursing him all his money that he is out upon it. And if the purchaser have notice of the incumbrances at the time when he buys in the precedent mortgages, it is not material, so that he had it not at the time of the purchase.

2. It was held, that if there be two mortgages, and a man having notice of them will come and purchase and buy in the first mortgage, and so endeavour to defeat the second mortgagee, in this case the second mortgagee shall be let in, upon payment of the first mortgage money, without any regard to the purchase money, for else by this means any man that is a second mortgagee might be cheated, and have no remedy. . . .

TABULA IN NAUFRAGIO. If one advances money in order to acquire an interest in property, and is ignorant of an outstanding equitable interest in another, and if he obtains a conveyance which he thinks gives him a legal interest or an equitable interest which would be superior to the outstanding equitable interest, although in fact he gets only a subsequent equitable interest or no equitable interest at all, and if he subsequently gets a conveyance of the legal title, even *after* he has notice of the outstanding equitable interest, the English courts hold that he takes free and clear of that interest, *provided* the transferor of

the legal title was not committing a breach of trust or violating any duty in making the conveyance. The leading case is *Marsh v. Lee*, 1 Ch. Ca. 162, 3 Ch. Rep. 62, 2 Vent. 337, 2 White & Tudor, L. C. Eq., 8 ed., 118. See *Bates v. Johnson*, Johns. 304.

The most common application of the doctrine is in the tacking of mortgages. "A third or subsequent mortgagee who when he lent his money had no notice of the second mortgage becomes entitled by paying off the first mortgage and getting a conveyance of the legal estate, to tack his own debt to the first mortgagee's so that the second mortgagee's right will be postponed to both these debts. This doctrine of tacking was abolished by the Vendor and Purchaser Act, 1874, sec. 7, but in the next year it was restored, for that section was repealed as from its commencement by the Land Transfer Act of 1875." Maitland, *Equity*, 286, 287. See Willoughby, *The Legal Estate*, 29-87.

This doctrine of tacking, which has been severely condemned even in England (*Jennings v. Jordan*, 6 A. C. 714), is rejected in the United States. Ames, 296. Moreover, the registry system would make the doctrine unimportant as far as it concerns land. *Osborn v. Carr*, 12 Conn. 196; *Grant v. Bissett*, 1 Caines Cas. in Error (N. Y.) 112; 1 White & Tudor, L. C. Eq., 3 Am. ed., 602; 4 Kent Com. 178; Jones, *Mortgages*, 7 ed., secs. 537, 1082. And it would have no application in jurisdictions in which a mortgagee has only a lien.

If the transferor of the legal title committed a breach of trust in making the transfer, the transferee, if he knew of the breach of trust, is not allowed to profit thereby. See *Maundrell v. Maundrell*, 10 Ves. 246; *Ex parte Knott*, 11 Ves. 609; *Carter v. Carter*, 3 K. & J. 617; *Pilcher v. Rollins*, L. R. 7 Ch. App. 259.

If the transferor committed a breach of trust but the transferee did not know of the breach of trust, does he take free and clear of the trust? In *Mumford v. Stohwasser*, L. R. 18 Eq. 556, 562, Jessel, M. R., expressed the opinion that he does not. See Ames, *Lect. Leg. Hist.* 267. But see *ibid.*, 283.

FIDELITY MUTUAL LIFE INS. CO. *v.* CLARK.

SUPREME COURT OF THE UNITED STATES. 1906.

203 U. S. 64.

HOLMES, J. This is a bill in equity, brought in the Circuit Court to enjoin the setting up of a judgment at law recovered in the same Circuit Court upon three policies of life insurance, on the ground that the judgment was obtained by fraud. It also seeks to compel the plaintiff in the action at law, and other parties to whom interests in the policies were assigned, to repay the sums which they received upon them. The judgment was rendered in a case which came before this court, and the dramatic circumstances of the alleged death are set forth in the report. *Fidelity Mutual Life Association v. Mettler*, 185 U. S. 308. The appellant is the plaintiff in error in that case, having changed its name. After the date of the judgment the appellant discovered that Hunter, the party whose life was insured, was alive, and that the recovery was the result of a deliberate plot. Thereupon it forthwith brought this bill. One of the defenses set up and argued below and here was that by the Seventh Amendment to the Constitution no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law. On the facts alleged and proved the Circuit Court entered a decree against the plaintiff at law, Mettler, now Smythe, but dismissed the bill as against the assignees of partial interests in the policies. The insurance company appealed to this court.

The material facts are these. By way of a contingent fee for the services in collecting the insurance, Mrs. Mettler assigned to the present defendant Clark and his partners one-third interest in the policies, with an additional sum in case statutory damages and attorney's fees were recovered. This afterwards came to Clark alone. Clark and Mrs. Mettler assigned five hundred dollars each, from their respective interests to the defendant Culberson, as a contingent fee for argument and services in this court. Clark also employed the defendant Spoons, it would seem on a contingent fee. Finally he mortgaged his right to the Phillips Investment Company. When the judgment was recovered, before execution, the insurance company paid the amount (\$24,028.25) into court. Out of this the clerk paid to Mrs. Mettler \$11,616; to Clark, \$8,346;

to Spoons on Clark's order, \$1,500; to Culberson, \$1,026, and to the Phillips Investment Company, \$1,540.24. It is these sums, other than that paid to Mrs. Mettler, that are in question here.

It will not be necessary to consider the constitutional question under the Seventh Amendment, to which we have referred, or some other questions which were raised, because we are of opinion that the appellees are entitled to keep their money, even if the judgment can be impeached for fraud. They all got the legal title to the money which was paid to them, or, what is the same thing, got the legal title transferred to their order. That being so, the appellant must show some equity before their legal title can be disturbed. It founds its claim to such an equity on the mode in which the judgment which induced it to part with the title to its money was obtained. But fraud, of course, gives rise only to a personal claim. It goes to the motives, not to the formal constituents of a legal transfer, *Rodliff v. Dallinger*, 141 Massachusetts, 1, 6, and the rule is familiar that it can affect a title only when the owner takes with notice or without having given value. *Fletcher v. Peck*, 6 Cranch, 87, 133; 2 Williams, Vendor & Purchaser, 674. See *The Eliza Lines*, 199 U. S. 119, 131. The question is whether the appellant can make out such a case as that.

It is said that the title of the appellees stands on the judgment, and that if the judgment fails the title fails. But that mode of statement is not sufficiently precise. The judgment hardly can be said to be part of the appellee's title. It simply afforded the appellant a motive for its payment into court. The appellees derive their title immediately from Mrs. Mettler, and remotely from the act of the appellant. They stand exactly as if the appellant had handed over the twenty-four thousand dollars in gold to her and she thereupon had handed their proportion to them. We are putting no emphasis on the fact that the thing transferred was money. The appellees knew from what fund they were paid, from what source it came, and why it was paid to Mrs. Mettler. We are insisting only that the title had passed to them. But we repeat that, as the title had passed, the appellant must find some equity before it can disturb it, and we now add that, as there is no question that the appellees took for value, that is in payment for their services, or, if it be preferred, in performance of Mrs. Mettler's contingent promise, the equity must be founded upon notice.

The notice to be shown is notice of the fact that the judgment which induced the appellant's payment was obtained by fraud. But notice cannot be established by the mere fact that while the appellees held an interest in the policies only they were assignees of choses in action, and took them subject to the equities. That is due to a chose in action not being negotiable. It does not stand on notice. The general proposition was decided in *United States v. Detroit Lumber Co.*, 200 U. S. 321, 333, 334, and *United States v. Clark*, 200 U. S. 601, 607, 608, and earlier in *Judson v. Corcoran*, 17 How. 612, 615, and, we have no doubt, is the law of England. Of course the assignee of an ordinary contract can only stand in the shoes of the party with whom the contract was made. In the discussions of the rule which we have seen, we have found no other reason offered, as no other is necessary. But the assumption of the good faith of the assignee occurs in more cases than one.

The principle which we apply is further illustrated by the priority given to the later of two equitable titles, if the legal title be added to it, 2 Pomeroy, Eq. 3d. ed., §§727, 768, by the doctrine of tacking, and, in some degree, by the great distinction recognized in other respects between the holder of title under an executed contract and a party to a contract merely executory. See 1 Williams V. & P. 540, and cases cited. We may add further that, even if we were wrong, the equities to which an assigned takes subject are equities existing at the time of the assignment, 1 Williams V. & P. 584, and that the notice with which he is supposed to be charged as an assignee can be of nothing more. Therefore merely as assignees the appellees had not notice of the as yet unaccomplished fraud in obtaining the judgment. The policies were honest contracts and it was an interest in the policies which was assigned, at least to Clark.

The appellant is driven, therefore, to contend, as it did contend at the argument, that notice of the denial that Hunter was dead, in the suit on the policy, was notice of the fraud. But it is admitted that the appellees all acted in good faith; that they believed the plaintiff's case. In such circumstances, even if the answer had gone further, and had charged the plaintiff with all that the present bill charges against her, when a jury had decided that the charges were groundless, a judgment had been entered on the verdict, and the insurance company had

accepted the result by paying the money into court without waiting for an execution, it would be impossible to say that the supposed notice was not purged. The appellees were not bound to contemplate future discoveries of what they honestly believed untrue, and a bill to impeach the final act of the law. See *Bank of the United States v. Bank of Washington*, 6 Peters, 8, 19.

Decree affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent.

MR. JUSTICE MCKENNA took no part in the decision of this case.¹

MURRAY AND WINTER v. LYLURN, ISHAM,
SPRAGUE AND DAVIS.

COURT OF CHANCERY, NEW YORK. 1817.

2 Johns. Ch. 441.

IN 1809, a bill was filed against Winter, who held certain lands in Cosby's manor, in trust for P. Heatly and others, in behalf of the *cestui que trusts*, charging him with a fraudulent breach of trust, and an injunction was issued against him, in February, 1810, enjoining from acting as trustee, and from selling any of the trust estate, or assigning the securities or proceeds thereof, &c. (*Vide* vol. 1. p. 26, 60, 77, 566.) Winter, notwithstanding, sold a lot of land, part of the trust estate, in August, 1810, to the defendant, Sprague, in fee, and took his bond and mortgage for the purchase money. Winter, afterwards, assigned the bond and mortgage to Robert Lylburn, deceased, whose executors, Lylburn and Isham, were made defendants. Since the assignment, about 180 dollars, part of the money, had been paid to Winter. Sprague, afterwards, in 1814, released all his interest in the land so purchased by him, to Davis, who is in possession thereof.

¹ *Merchants' Ins. Co. v. Abbott*, 131 Mass. 397, *accord*. See Ames, *Lect. Leg. Hist.*, 277, 278; 4 *Harv. L. Rev.* 304, 305.

It is, of course, well settled that an assignee of a non-negotiable *chase* in action takes subject to equitable defences of the obligor acquired before notice of the assignment. Pomeroy, *Eq. Juris.*, sec. 704; Wald's *Pollock on Contracts*, Williston's ed., 284; Williston, *Cas. Contracts*, 440n.; Dec. Dig., *Assignments*, secs. 99-103. The law is otherwise as to defences acquired after such notice. Williston, *Cas. Contracts*, 440n. See Chap. I, sec. VIII, *ante*.

The result is different if the obligor has done anything to estop himself from setting up his defence. Pomeroy, *Eq. Juris.*, sec. 704.

The defendants, Lylburn and Isham, denied all knowledge of the sale of the land to Sprague, or of the trust; and, according to their knowledge and belief, all notice to their testator, of the suit against Winter, and of the injunction; and they averred that he took the assignment of the bond and mortgage, *bona fide*, for a valuable consideration.

The bill was taken *pro confesso*, against Sprague and Davis.

THE CHANCELLOR [KENT]. The question is, whether the executors of Lylburn are to be held accountable to the *cestui que trusts* (in whose behalf Murray, as receiver, instituted the suit) for the bond and mortgage, in like manner as Winter may be, or would have been, had he not assigned them.

The case states, that the bill has been taken *pro confesso* against Sprague, the purchaser, and against Davis, who holds under him. It also states, that Davis is in possession.

The *cestui que trusts* are not entitled to the land, and also to the purchase money. The two claims, as I observed in the analogous case of *Murray v. Ballou and Hunt*, (1 Johns. Ch. Rep. 581,) are inconsistent with each other. The one sets aside, and the other affirms the sale. If the *cestui que trusts* choose to disregard the alienation made by the trustee, pending the suit against him, (as they may do according to the settled doctrines of the court,) then they have nothing to do with these securities, but are to look solely to the land, taking no notice of the alienation by Winter. They ought to be put to their election. I am inclined to think they may, if they please, affirm the sale, and look to these securities; and if they do, then the bill, as against Sprague and Davis, ought to be dismissed.

It is a general and well-settled principle, that the assignee of a *chose in action* takes it subject to the same equity it was subject to in the hands of the assignor. (2 Vern. 691, 764. 1 P. Wms. 496. 1 Ves. 123. 4 Vesey, jun. 121.) But this rule is generally understood to mean the equity residing in the original obligor or debtor, and not an equity residing in some third person against the assignor. He takes it *subject to all the equity of the obligor*, say the judges in the very elaborately argued case of *Norton v. Rose*, (2 Wash. Rep. 233, 254,) on this very point, touching the rights of the assignee of a bond. The assignee can always go to the debtor, and ascertain what claims he may have against the bond, or other *chose in action*, which he is about purchasing from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of

some third person against the obligee. He has not any object to which he can direct his inquiries; and, for this reason, the claim of the assignee, without notice of a *chose* in action, was preferred, in the late case of *Redfearn v. Ferrier* and others, (1 Dow. Rep. 50,) to that of a third party setting up a secret equity against the assignor. Lord Eldon observed, in that case, that if it were not to be so, no assignments could ever be taken with safety. I am not aware that this decision was the introduction of any new principle, in the case of actual *bona fide* purchases or assignments *by contracts*; though Lord Thurlow said, in one case, (1 Vesey, jun. 249,) that the purchaser of a *chose in action* must abide by the case of the person from whom he buys; but he spoke this on a question between the assignee and the debtor. In assignments, by *operation of law*, as to assignees of bankrupts, the case may be different; for such assignments are said to pass the rights of the bankrupt, subject to all equities, and precisely in the same plight and condition as he possessed them. (1 Atk. 162. 9 Vesey, 100.) The ground, however, on which I place the right of the *cestui que trusts*, in this case, to pursue the bond and mortgage in the hands of the assignee of Winter, is the constructive notice to all the world, arising from the bill and supplementary bill, filed in 1809, against Winter, for a breach of trust. The object of that suit was to take the whole subject of the trust out of his hands, together with all the papers and securities relating thereto. If Winter had held a number of mortgages, and other securities, in trust, when the suit was commenced, it cannot be pretended, that he might safely defeat the object of the suit, and elude the justice of the court, by selling these securities. If he possessed cash, as the proceeds of the trust estate, or negotiable paper not due, or perhaps moveable personal property, such as horses, cattle, grain, &c., I am not prepared to say the rule is to be carried so far as to affect such sales. The safety of commercial dealing would require a limitation of the rule; but bonds and mortgages are not the subject of ordinary commerce; and they formed one of the specific subjects of the suit against Winter, and the injunction prohibited the sale and assignment of them as well as of the lands held in trust. If the trustee pending the suit changed the land into personal security, as he did in this case, I see no good reason why the *cestui que trusts* should not be at liberty to affirm the sale, and take the security; and whoever, afterwards, purchased it, was charge-

able with notice of the suit. He was dealing with a subject out of the ordinary course of traffic, and always understood to be subject to certain equities; and there can be very little ground for the complaint of hardship in the application to such a case, of the general doctrine of the court. There is no principle better established, nor one founded on more indispensable necessity, than that the purchase of the subject matter in controversy, *pendente lite*, does not vary the rights of the parties in that suit, who are not to receive any prejudice from the alienation. The latent equity here might easily have been discovered by Lylburn, when he purchased, by applying to the records of this court. If the *cestui que trust* be entitled, as between him and his trustee, to take the securities or the land, at his election, it ought not to be in the power of the trustee to defeat that election, by selling the securities. The litigating parties are not to have their rights affected by any alienation during the pendency of the suit. . . .

I shall, accordingly, decree, that the plaintiffs, by their solicitor, signify, by an election in writing, signed by such solicitor, and filed in the register's office, their determination whether to proceed against the defendants, Sprague and Davis, for the land, or against the defendants, Lylburn and Isham, for the bond and mortgage mentioned in the pleadings. That if such election be to proceed against the defendants, Sprague and Davis, then the bill, as against the defendants, Lylburn and Isham, shall, from the time of filing such writing, stand dismissed; and the defendants, S. and D., shall, within thirty days, convey the lot in the pleadings mentioned to the present trustees, &c. and pay the costs of the suit against them; but that if such election be to proceed against the defendants, Lylburn and Isham, then the bill as against the defendants, Sprague and Davis, shall, from the time of filing such writing, stand dismissed, and the said defendants, Lylburn and Isham, shall, within thirty days from the service of a copy of this decree, and of such election, at their own expense, reassign and deliver to the said solicitor, or his order, for the use of the *cestui que trusts*, for whose benefit this suit was instituted, the said bond and mortgage, together with all the right and interest of their testator, at the time of his death, therein, and shall also pay the sum of 157 dollars and five cents, which they have admitted, by their answer, to have been received by their testator, on the bond and mortgage, subsequent to the assignment thereof, together with lawful

interest thereon, from the 30th of November, 1811, when it was received; and that if the plaintiffs shall not make and file their election, as aforesaid, within forty days from the date of this decree, then the bill, as to all the defendants, shall be dismissed. . . .

*Decree accordingly.*¹

¹ The distinction between "latent" and "patent" equities has been repudiated in New York. *Beebe v. State Bank*, 1 Johns. 529; *Bush v. Lathrop*, 22 N. Y. 535, and numerous later New York cases. See also *Moore v. Jervis*, 2 Coll. 60; *Brandon v. Brandon*, 7 DeG. M. & G. 365; *Cory v. Eyre*, 1 DeG. J. & S. 149; *Re European Bank*, L. R. 5 Ch. App. 358; *West v. MacInnes*, 23 U. C. Q. B. 357; *Cowdrey v. Vandeburgh*, 101 U. S. 572; *Butcher v. Werksman*, 204 Fed. 330; *Moore v. Moore*, 112 Ind. 149; *Ames v. Richardson*, 29 Minn. 330; *Turner v. Hoyle*, 95 Mo. 337; *Kernohan v. Durham*, 48 Oh. St. 1; *Patterson v. Rabb*, 38 S. C. 138; *Downer v. So. Royalton Bk.*, 39 Vt. 25.

But in a number of states the rule enunciated by Chancellor Kent is followed. See *National Bank v. Texas*, 20 Wall (U. S.) 72, 89; *Mohr v. Byrne*, 135 Cal. 87; *Western Bk. v. Maverick Bk.*, 90 Ga. 339; *Silverman v. Bullock*, 98 Ill. 11; *Crosby v. Tanner*, 40 Iowa 136; *Newton v. Newton*, 46 Minn. 33; *Moffett v. Parker*, 71 Minn. 139; *Hibernian Bk. v. Everman*, 52 Miss. 500; *Lozey v. Hoagland*, 11 N. J. Eq. 246; *Starr v. Haskins*, 26 N. J. Eq. 414; *Tate v. Security T. Co.*, 63 N. J. Eq. 559; *Appeal of Mifflin Co. Nat. Bk.*, 98 Pa. 150; *Moore v. Holcombe*, 3 Leigh (Va.) 597; *Church Bldg. Soc. v. Free Church*, 24 Wash. 433.

Even in jurisdictions in which assignees of *choses* in action take subject to latent equities, it is held that the purchaser of shares of stock may take free and clear of the trust although he receives notice before a transfer has been made on the books of the company. *Dodds v. Hills*, 2 H. & M. 424; *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Oh. St. 589. See *Ames*, 299n.; 1 *Machen, Corps.*, sec. 882. By the Uniform Stock Transfer Act, certificates of stock are made negotiable by indorsement. In general as to a *chose* in action represented by a non-negotiable specialty, see 30 Harv. L. Rev. 103, 104. As to overdue negotiable paper, see *Chafee, Rights in Overdue Paper*, 31 Harv. L. Rev. 1104.

In general on the question how far "latent" or "collateral" equities in *choses* in action are cut off by an assignment to a transferee for value and without notice, see 29 Harv. L. Rev. 816; 30 *ibid.* 97, 449; 31 *ibid.* 822; *Ames*, 309, 310; *Ames, Lect. Leg. Hist.*, 258-260; *Perry, Trusts*, sec. 831; *Wald's Pollock on Contracts*, Williston's ed., 284, 285; *Pomeroy, Eq. Juris.*, secs. 708-712; 5 *Corp. Jur.* 974.

Partial assignments. In *Holmes v. Gardner*, 50 Oh. St. 167, it was held that a partial assignee of a mortgage note who took for value and without notice that the mortgage was given to defraud creditors, took free of the claims of the creditors.

As to the rights of successive partial assignees of a *chose* in action, see *Third Nat. Bk. v. Atlantic City*, 126 Fed. 413 (priority according to dates of notice to debtor); *Moore's App.*, 92 Pa. 309 (*pro rata*).

As to the effect of a partial assignment of a *chose* in action followed by a

TAYLOR *v.* GITT.

SUPREME COURT, PENNSYLVANIA. 1849.

10 Pa. 428.

IN error from the Common Pleas of Dauphin.

Daniel Gitt was the holder of a note sealed by Boyer *et al.*, payable January 1st, 1848. On the 4th of May, 1847, he assigned it "for value received" to Pelouze. Jos. Gitt had previously endorsed it. On the 8th of May, Pelouze assigned it to Taylor *et al.* An action was brought in the name of the obligee, to the use of Taylor, and judgment recovered. On affidavit, a feigned issue was directed to try whether Daniel Gitt (plaintiff) or Taylor *et al.* (defendants), were entitled to the money. On the trial, Jos. Gitt, for the plaintiff (under exception), having been released, proved that he gave this bill to Pelouze in payment of articles purchased of him for Daniel Gitt, the obligee. That afterwards Pelouze procured a levy to be made on the goods, under a judgment against Joseph Gitt, and they were sold. It was, however, proved, that the assignment to Taylor was for value, and, so far as could be gathered from the record, this was prior to the levy. The defendants offered Pelouze as a witness, having released him; but he was rejected.

The court (ELDRED, P. J.) said, that Pelouze's acts, after the assignment to Taylor *et al.*, would not affect them, if Daniel Gitt had notice of the transfer; but if he had not notice, they would be affected, and that the facts proved avoided the transfer to Pelouze.

This, and the exceptions to the evidence, were the errors assigned.

BELL, J. . . . Daniel Gitt, the obligee, endorsed on the bill single, his transfer of it to Pelouze, purporting to be for value. Pelouze, in the course of trade, offers it to Taylor & Co., who learn from the obligors that they have no defence to make

total assignment, see *Tourville v. Naish*, 3 P. Wms. 307; *The Elmbank*, 72 Fed. 610; *Columbia etc. Co. v. First Nat. Bk.*, 116 Ky. 364; *King Bros. & Co. v. Central etc. Ry. Co.*, 135 Ga. 225; *Pickett v. School Dist.*, 193 Mo. App. 519; *Fairbanks v. Sargent*, 104 N. Y. 108, 117 N. Y. 320; *Gillette v. Murphy*, 7 Okla. 91. Cf. *Bridge v. Conn. Mut. Life Ins. Co.*, 152 Mass. 343. See 30 Harv. L. Rev. 104-105, 480-484; and see Chap. I, sec. VIII, *ante*.

against it. Taylor & Co. then accept an assignment of it from Pelouze, to whom they pay value. Shall the men who first gave it currency be permitted, afterwards, to set up the fraud of the first assignee, which his act enabled the latter to commit against an innocent holder, without notice? In this aspect it comes directly within the axiom that when one of two innocent persons must suffer, he whose act gave occasion of the loss shall bear it: *McMullen v. Wenner*, 16 S. & R. 21. It will not do to answer, the last assignee should have inquired of the obligee whether any difficulties existed, before accepting the bill. This has never been held incumbent in the purchaser of a bond, simply because it is not to be supposed any information could be derived from one who appears to have parted with his whole interest in the thing. It follows that Taylor & Co. were not open to be affected by the alleged fraud of Pelouze, unless they knew of it, before giving value for the bill single. Of this there was no proof, and, consequently, they were injured by the charge. I need hardly say, that proof of a conspiracy, connecting the Taylors with the alleged trick played off by Pelouze upon Gitt, would put a very different face upon the case. But, as the matter now stands, I see no good reason why the plaintiffs below should not be permitted to recover the money in court.

*Judgment reversed, and a venire de novo awarded.*¹

DUFF v. RANDALL.

SUPREME COURT, CALIFORNIA., 1897.

116 Cal. 226.

HARRISON, J. Ejectment for certain lands in the county of Humboldt.

The title to the property in question was vested in William R. Duff in 1863, and upon his death, in 1875, the plaintiffs

¹ See *Moore v. Moore*, 112 Ind. 149; *Moore v. Metropolitan Bk.*, 55 N. Y. 41; *Ames*, 310; *Pomeroy*, Eq. Juris., secs. 707, 710; *Wald's Pollock on Contracts*, Williston's ed., 294n.; *Ames*, Lect. Leg. Hist., 210; 1 *Harv. L. Rev.* 7, 8; *Dec. Dig.*, Assignments, sec. 115.

As to the effect of clothing an agent or bailee or trustee with the *indicia* of title, see *Shropshire etc. Co. v. Queen*, L. R. 7 H. L. 496; *Carritt v. Real etc. Co.*, 42 Ch. D. 263; *Brown v. Equitable etc. Soc.*, 75 Minn. 412; *McNeil v. Tenth Nat. Bk.*, 46 N. Y. 325; *Pomeroy*, Eq. Juris., sec. 710. Cf. *Wolf v. Amer. T. & Sav. Bk.*, 214 Fed. 761.

herein succeeded to his interest in the property as his heirs at law. In 1869 he, by his attorney, conveyed the property to Robert P. Duff, who mortgaged it to Huntoon July 19, 1877. In an action by these plaintiffs against Robert P. Duff (the facts of which are found in *Duff v. Duff*, 71 Cal. 513), it was determined that by reason of the fraud of the attorney, this conveyance did not have the effect to divest William R. Duff of his title thereto. William R. Duff had, however, given to his attorney authority to convey the property, and, although the conveyance was invalid as against William R. Duff and the plaintiffs herein, it was not absolutely void, and a *bona fide* purchaser for value from the grantee would hold the title as against William R. Duff, or as against the plaintiffs herein. The facts relating to the controversy between the parties hereto are substantially the same as those presented in the case of *Randall v. Duff*, 79 Cal. 115. The material difference between the present action and that is, that in that action it was shown that the suits for the foreclosure of the mortgages executed by Robert P. Duff to Ritchie and Fiebig were not commenced until after the commencement of the action of *Duff v. Duff*, *supra*, and after a notice of the *lis pendens* had been filed in the office of the county recorder; whereas, in the present case it was shown that the suit of *Duff v. Duff*, *supra*, was not commenced until after the property involved herein had been sold to the defendant Randall under the judgment in the foreclosure suit. The suit of *Duff v. Duff*, *supra*, was commenced by the plaintiffs herein December 30, 1880. The action to foreclose the Huntoon mortgage was begun August 14, 1880, and judgment was rendered therein October 28, 1880. November 30, 1880, the sheriff sold the property under this judgment to the defendant Randall, who paid the purchase price therefor and received a certificate of sale the same day. The sheriff's deed was executed to Randall August 18, 1881, and on August 8, 1882, Randall conveyed the property to the defendants Murphy and McAleenan. Neither Randall nor either of the other defendants herein had any notice of the plaintiffs' claim to the property until after the filing of the notice of *lis pendens* in the suit of *Duff v. Duff*, *supra*. The present action was begun December 12, 1894.

The decision in *Randall v. Duff*, *supra*, was given in favor of the plaintiffs herein upon the ground that, by reason of the commencement of the action of *Duff v. Duff*, *supra*, before the commencement by Ritchie of his action to foreclose, the purchaser

under the judgment in that action had notice of the plaintiffs' claim, and purchased subject to their rights; but it was said in the opinion given upon the rehearing in that case: "If Ritchie had foreclosed without notice of William Duff's interest in the mortgaged estate, the foreclosure would have cut off his right of redemption, for precisely the same reason that the mortgage subjected his estate to a lien — for the reason, that is to say, that no man can be allowed to mislead another to his injury." It is contended by the appellants herein, however, that this expression in the opinion is not conclusive of the present appeal, for the reason that the foreclosure of a mortgage is not complete until the time for redemption has expired and the sheriff's deed has been executed to the purchaser, and that Randall did not receive the sheriff's deed until after the commencement of the action of Duff v. Duff, *supra*. In support of this proposition counsel for appellants have cited expressions in some opinions to the effect that the term "foreclosure" implies the execution of the sheriff's deed, as well as the sale under the judgment, and argue therefrom that in the present case the Huntton mortgage was not foreclosed at the time the suit of Duff v. Duff, *supra*, was commenced. An examination of these cases, however, will show that in none of them was such a proposition decided by the court, and that the language used in the opinions was merely in the nature of an illustration. . . .

Although the right of a mortgagor to redeem the mortgaged premises is not cut off until the expiration of the time allowed for redemption, yet the purchaser at a sale under the judgment rendered in the foreclosure suit acquires the same interest in the property sold as does a purchaser in property sold under an ordinary money judgment. "Upon the sale the purchaser acquires all the right, title, interest, and claim of the debtor thereto" (Code Civ. Proc., sec. 700), and only the right to redeem from this sale is left in the mortgagor. If a redemption is made by the mortgagor it is not from the lien of the mortgage, but from the sale under the judgment, and the amount which he is required to pay under such redemption is not the amount of the mortgage, but the amount for which the property was sold. Prior to the entry of the judgment the mortgagor holds the title to the property subject to the lien of the mortgage, and after the judgment is entered, and before the sale, he holds it subject to the lien of the judgment; but after the sale he has only a right of redemption, while the purchaser has the entire

beneficial interest in the property, subject to be defeated by a redemption from the sale: "The execution of the deed gives to the purchaser at the sale no new title to the land purchased by him, but is merely evidence that his title has become absolute." (Robinson v. Thornton, 102 Cal. 680.) "The purchaser obtains an inchoate right which may be perfected into a perfect title without any further act than the execution of a deed in pursuance of a sale already made. It is not a mere right to have a certain sum charged upon the property satisfied out of it. The sum before charged upon the land has already been satisfied by the sale to the extent of the amount bid and paid by the purchaser. The purchaser has already bought the land and paid for it. The sale is simply a conditional one, which may be defeated by the payment of a certain sum by certain designated parties within a certain limited time. If not paid within the time the right to a conveyance becomes absolute without any further sale, or other act to be performed by anybody." (Page v. Rogers, 31 Cal. 301.) The purchaser is entitled to all the rents and profits of the property sold, or the value of its use and occupation from the time of the sale until the redemption (Code Civ. Proc., sec. 707), and if no redemption is made he is entitled to retain these rents and profits without any obligation to account therefor to the mortgagor.

Strictly speaking, however, there could have been no "foreclosure" of the plaintiffs herein in the suit upon the Huntoon mortgage. A foreclosure is limited to the mortgagor and those claiming under him, while the plaintiffs herein claim by title superior to both the mortgagor and the mortgagee in the action on the Huntoon mortgage, and in the respect that their title is paramount thereto it would not be affected by that suit; but to the extent that they are estopped as against the mortgagee or the purchaser at the sale under his judgment from questioning the validity of the mortgagor's title, they are bound by the judgment as fully as if they had been made parties to the suit, and the extent of this estoppel is measured by the notice of their claim, given by them or by their predecessor. This is the purport of the decision in Randall v. Duff, *supra*. To the extent that William R. Duff held his attorney out to the world as authorized to convey the land, these plaintiffs are as much estopped as he would have been to assert any rights against a *bona fide* purchaser for value, under a conveyance made by the attorney. A purchaser of real property

at an execution sale stands in the same position as any other purchaser from the judgment debtor, and the certificate of sale which he receives from the sheriff is a conveyance within the meaning of the recording act, by which he is protected from the unrecorded claims of others, of which he did not have notice. . . . By virtue of the principles thus declared, the title acquired by Randall under his purchase at the sheriff's sale must prevail over that held by the plaintiffs, of which he had no notice until after he had paid the purchase money, and received the certificate of sale. He is fully protected in this purchase, and his right to this protection is the same whether he received the notice of the plaintiff's claim before or after the execution of the sheriff's deed. He was a *bona fide* purchaser for value before the notice was given, and his rights cannot be affected by any notice given thereafter. The judgment and order are affirmed.¹

GAROUTTE, J., and VAN FLEET, J., concurred.

Hearing in Bank denied.

PHILLIPS v. PHILLIPS.

CHANCERY. 1861.

4 De G. F. & J. 208.

THE LORD CHANCELLOR [WESTBURY].² When I reserved my judgment at the conclusion of the argument in this case, it was rather out of respect to that argument than from a feeling of any difficulty with regard to the question that had been so strenuously contested before me.

The case is a very simple one. The plaintiff claims as the grantee of an annuity granted by a deed dated in the month of February, 1820, to issue out of certain lands in the county of Monmouth, secured by powers of distress and entry. The annuity or rent-charge was not to arise until the death of one Rebecca Phillips, who died in the month of December, 1839, and the first payment of the annuity became due on the 8th of March, 1840.

¹ See Pomeroy, Eq. Juris., sec. 683n.

In *Hume v. Dixon*, 37 Oh. St. 66, the owner of land subject to an equity sold it to an innocent purchaser, but owing to the failure of the officer taking the acknowledgment to sign his name thereto, the legal title did not pass. It was held nevertheless that the transferee prevailed over the equitable claimant. See Ames, Lect. Leg. Hist., 257; 1 Harv. L. Rev. 5.

² The statement of facts is omitted.

The case was argued on both sides on the admitted basis that the legal estate was outstanding in certain incumbrancers, and is still outstanding. Subject to the annuity the grantor was entitled in fee-simple in equity. In February, 1821, the grantor intermarried with one Mary Phillips. On the occasion of that marriage, a settlement, dated in February, 1821, was executed, and under this deed the defendants claim; and claim, therefore, as purchasers for a valuable consideration. No payment has ever been made in respect of the annuity.

The bill was filed within twenty years, and seeks the ordinary relief applicable to the case. The defendants by their answer insist that the deed was voluntary, and therefore void under the Statute of Elizabeth, as against them in their character of purchasers for valuable consideration, and they also insist upon the Statute of Limitations. But in the answer the defence of purchase for valuable consideration without notice is not attempted to be raised.

At the hearing, an affidavit of Mary Phillips and another person was produced, denying the fact of notice of the annuity at the time of the grant and at the time of the creation of the marriage settlement, and the contention at the bar was that the defence of purchase for valuable consideration without notice was available for the defendants, under these circumstances, and ought to be allowed as a bar to the claim by the court. The Vice-Chancellor in his judgment refused to admit the defence of purchase for valuable consideration without notice, and I entirely agree with him in the conclusion that such a defence requires to be pleaded by the answer, more especially where an answer has been put in.

But I do not mean to rest my decision upon that particular ground because I have permitted the argument to proceed with reference to the general proposition, which was maintained before me with great energy and learning, viz. that the doctrine of a court of equity was this, that it would give no relief whatever to any claimant against a purchaser for valuable consideration without notice. It was urged upon me that authority to this effect was to be found in some recent decisions of this court, and particularly in the case decided at the Rolls of *The Attorney-General v. Wilkins*, 17 Beav. 285.

I undoubtedly was struck with the novelty and extent of the doctrine that was thus advanced, and in order to deal with the argument it becomes necessary to revert to elementary prin-

ciples. I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance; that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to, and no more. If, therefore, a person seised of an equitable estate (the legal estate being outstanding), makes an assurance by way of mortgage or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, viz. the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the dates of their securities; and the maxim applies, "*Qui prior est tempore potior est jure.*" The first grantee is *potior*; that is, *potentior*. He has a better and superior — because a prior — equity. The first grantee has a right to be paid first, and it is quite immaterial whether the subsequent incumbrancers at the time when they took their securities and paid their money had notice of the first incumbrance or not. These elementary rules are recognized in the case of *Brace v. Duchess of Marlborough*, 2 P. Wms. 491, and they are further illustrated by the familiar doctrine of the court as to tacking securities. It is well known that if there are three incumbrancers, and the third incumbrancer, at the time of his incumbrance and payment of his money, had no notice of the second incumbrance, then, if the first mortgagee or incumbrancer has the legal estate, and the third pays him off, and takes an assignment of his securities and a conveyance of the legal estate, he is entitled to tack his third mortgage to the first mortgage which he has acquired, and to exclude the intermediate incumbrancer. But this doctrine is limited to the case where the first mortgagee has the legal title; for if the first mortgagee has not the legal title, the third does not by the transfer obtain the legal title, and the third mortgagee by payment off of the first acquires no priority over the second. Now, the defence of a purchaser for valuable consideration is the creature of a court of equity, and it can never be used in a manner at variance with the elementary rules which have already been stated. It seems at first to have been used as a shield against the claim in equity of persons having a legal title. *Bassett v. Nosworthy*, Finch, 102, 2 White & T. L. C. 1, is, if not the earliest, the best early reported case on the subject. There the plaintiff claimed under a legal title, and this circumstance,

together with the maxim which I have referred to, probably gave rise to the notion that this defence was good only against the legal title. But there appear to be three cases in which the use of this defence is most familiar: —

First, where an application is made to an auxiliary jurisdiction of the court by the possessor of a legal title, as by an heir-at-law (which was the case in *Bassett v. Nosworthy*), or by a tenant for life for the delivery of title-deeds (which was the case of *Wallwyn v. Lee*, 9 Ves. 24), and the defendant pleads that he is a *bond fide* purchaser for valuable consideration without notice. In such a case the defence is good, and the reason given is that as against a purchaser for valuable consideration without notice the court gives no assistance; that is, no assistance to the legal title. But this rule does not apply where the court exercises a legal jurisdiction concurrently with courts of law. Thus it was decided by Lord Thurlow in *Williams v. Lambe*, 3 B. C. C. 264, that the defence could not be pleaded to a bill for dower; and by Sir J. Leach, in *Collins v. Archer*, 1 Russ. & Mylne, 284, that it was no answer to a bill for tithes. In those cases the court of equity was not asked to give the plaintiff any equitable as distinguished from legal relief.

The second class of cases is the ordinary one of several purchasers or incumbrancers each claiming in equity, and one who is later and last in time succeeds in obtaining an outstanding legal estate not held upon existing trusts or a judgment, or any other legal advantage the possession of which may be a protection to himself or an embarrassment to other claimants. He will not be deprived of this advantage by a court of equity. To a bill filed against him for this purpose by a prior purchaser or incumbrancer, the defendant may maintain the plea of purchase for valuable consideration without notice; for the principle is, that a court of equity will not disarm a purchaser, that is, will not take from him the shield of any legal advantage. This is the common doctrine of the *tabula in naufragio*.

Thirdly, where there are circumstances that give rise to an equity as distinguished from an equitable estate, — as, for example, an equity to set aside a deed for fraud, or to correct it for mistake, — and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the court will not interfere.¹

¹ As to the alleged difference between an equity and an equitable estate, see 1 Harv. L. Rev. 2; Ames, Lect. Leg. Hist., 253.

Now these are the three cases in which the defence in question is most commonly found. None of them involve the case that is now before me.

It was indeed said at the bar that the defendants, being in possession, had a legal advantage in respect of the possession, of which they ought not to be deprived. But that is to confound the subject of adjudication with the means of determining it. The possession is the thing which is the subject of controversy, and is to be awarded by the court to one or to the other. But the subject of controversy, and the means of determining the right to that subject are perfectly different. The argument, in fact, amounts to this: "I ought not to be deprived of possession, because I have possession." The purchaser will not be deprived of anything that gives him a legal right to the possession, but the possession itself must not be confounded with the right to it.

The case, therefore, that I have to decide is the ordinary case of a person claiming under an innocent equitable conveyance that interest which existed in the grantor at the time when that conveyance was made. But, as I have already said, that interest was diminished by the estate that had been previously granted to the annuitant, and as there was no ground for pretending that the deed creating the annuity was a voluntary deed, so there is no ground whatever for contending that the estate of the person taking under the subsequent marriage settlement is not to be treated by this court, being an equitable estate, as subject to the antecedent annuity, just as effectually as if the annuity itself had been noticed and excepted out of the operation of the subsequent instrument.

I have no difficulty, therefore, in holding that the plea of purchase for valuable consideration is upon principle not at all applicable to the case before me, even if I could take notice of it as having been rightly and regularly raised.

We next come to examine the authorities upon which the defence relies. Now, undoubtedly, I cannot assent to some observations which I find attributed to the Master of the Rolls in the report of the case of *The Attorney-General v. Wilkins*; but to the decision of that case, as explained by his Honor in the subsequent case of *Colyer v. Finch*, 19 Beav. 500, I see no reasonable objection, and the principles that I have here been referring to are fully explained and acted on by the Master of the Rolls in the case of *Colyer v. Finch*. It is impossible, there-

fore, to suppose that he intended to lay down anything in the case of *The Attorney-General v. Wilkins*, which is at variance with the ordinary rules of the court as I have already explained them, or which could give countenance to the argument that has been raised before me at the bar.

I have consequently no difficulty in holding that the decree of his Honor the Vice-Chancellor is right upon the grounds on which he placed it in the court below, and that also it would have been right if he had considered the grounds which have been urged before me in support of this petition of rehearing. I therefore affirm the decree and dismiss the petition of rehearing; but inasmuch as the plaintiff sues in *formâ pauperis*, of course it must be dismissed without costs.

CAVE v. CAVE.

CHANCERY. 1880.

15 Ch. D. 639.

THE plaintiffs were the *cestuis que trust* under the settlement executed on the marriage of Mr. and Mrs. Frederick Cave on the 27th of January, 1863. On the 27th of November, 1867, the defendant Charles Cave was appointed trustee of the settlement, and in the year 1871 he became the sole trustee.

The trust funds, which were at that time in his hands, consisted of 3,600*l.* advanced on mortgage and 276*l.* consols. Out of these sums 1,950*l.* and 702*l.* 17*s.* 6*d.* were improperly invested in the purchase of certain lands at Wandsworth in the following manner:—

Charles Cave, the trustee, received the trust moneys which had been secured on mortgage in 1872, and paid it to an account in the National and Provincial Bank in the joint names of himself and his brother Frederick Cave. A cheque was drawn on this account in June, 1872, by the two in favor of Frederick Cave, and the money was laid out in the purchase of freehold land at Wandsworth. Charles Cave acted in the purchase as trustee of the settlement and also as solicitor of himself and of Frederick Cave, and the conveyance of the property was made to Frederick Cave, and the deeds relating to the property were held by Charles Cave, the trustee of the settlement.

In September, 1872, another cheque was drawn by Charles Cave and Frederick Cave on their banking account in favor of the Accountant-General of the Court of Chancery, and the proceeds were applied in purchasing other land at Wandsworth, and the conveyance of the land was prepared by Charles Cave, and was made to Frederick Cave.

The defendant Philip Chaplin, on the 10th of February, 1873, advanced to Frederick Cave 2,500*l.* on a first mortgage of the land thus improperly purchased, which contained absolute covenants for title by Frederick Cave. Charles Cave acted as the solicitor of Philip Chaplin in relation to the said advance, and stated that the land belonged to one of his brothers, and the question arose whether Philip Chaplin had or had not constructive notice through Charles Cave who so acted as his solicitor, that the said lands had been purchased with and represented the trust moneys subject to the trusts of the settlement.

In October, 1873, the defendant John White advanced 1,800*l.* on the same property without notice of the first mortgage, and on this occasion Charles Cave wrote a letter to Mr. White stating that Frederick Cave had lately bought the freehold house and land at Wandsworth, which had compelled him to withdraw some of his capital from his business.

The other defendants, W. Nichols and Haslam, Appleton, & Company, also advanced money on subsequent mortgages of the same land to Frederick Cave, and in 1874 Philip Chaplin, the first mortgagee, made further advances on the same security.

In 1875 Frederick Cave, who had been in business with George Cave, dissolved partnership upon the terms of his paying to George Cave 5,000*l.*, 2,250*l.* of which was secured by a mortgage of the same lands. In this case, however, Mr. Justice Fry was of opinion that George Cave had actual notice of the breach of trust.

In April, 1879, Frederick Cave became a bankrupt, and the plaintiffs claimed to prove against his estate for these breaches of trust, and they also claimed priority over all the liens claimed on the land by the several defendants, on the ground that when they took their charges they had constructive notice of the breach of trust.

The defendants denied that they had notice, and relied especially on the fraud of Charles Cave as a circumstance raising

a presumption that he would not have communicated the circumstances of his fraud to the mortgagees.

FRY, J., stated the facts, and continued:—

The question before me concerns the priority of the liens or charges claimed against the Wandsworth property. The plaintiff's right to a charge against the original purchaser of the property, Frederick Cave, is not and could not be in dispute. The question, however, arises between persons who claim subsequently to the original purchase by the trustee, or rather by Frederick Cave, who obtained the money from the trustee.

It appears that after the two conveyances were made to Frederick Cave in June and September, 1872, Frederick Cave, in February, 1873, mortgaged the property to the defendant Philip Chaplin for the sum of 2,500*l.*, and subsequent advances were made by Chaplin which bring the amount in all up to 5,550*l.* With regard to the last of those advances, the sum of 550*l.*, it was subsequent to Mr. White's advance, and it has not been contended that it can have priority over that. Between the plaintiff and Chaplin the course of argument has been this: It has been proved that the same solicitor, Mr. Charles Cave, who was also surviving trustee, acted in the matter of Chaplin's mortgage both for Chaplin and for the mortgagor, Frederick Cave.¹ . . .

The conclusion I arrive at is, that Chaplin has sustained the burden cast upon him of proving that the circumstances are such as repel the construction or imputation to the principal of notice to the agent. Therefore I hold that Mr. Chaplin's mortgage has a priority over the plaintiffs'.

The next question arises between the plaintiffs and White, and also between all the other incumbrancers upon the fund. That question is of this nature: all these incumbrancers allege that they are purchasers for value without notice, and they plead that, being purchasers for value without notice, they have a sufficient and conclusive defence. That defence, as we all know, has been the subject of a great deal of decision, and it is by no means easy to harmonize the authorities and the opinions expressed upon the subject. Criticisms upon old cases lie many strata deep, and eminent Lord Chancellors have expressed diametrically opposite conclusions upon the same question. The case of *Phillips v. Phillips*, 4 D. F. & J.

¹ A part of the opinion relating to the question of constructive notice to Chaplin is omitted.

208, is the one which has been principally urged before me, and that, as being the decision of a Lord Chancellor, is binding upon me, notwithstanding the subsequent comments upon it of Lord St. Leonards in his writings. That case seems to me to have laid down this principle, that, as between equitable interests, the defence will not prevail where the circumstances are such as to require that this Court should determine the priorities between them. The classes of cases to which that defence will apply are other than that. Lord Westbury in the course of his judgment in that case said this (p. 215): "I take it to be a clear proposition that every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more. If, therefore, a person seised of an equitable interest (the legal estate being outstanding), makes an assurance by way of mortgage, or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, namely, the estate subject to the mortgage or annuity, and no more. The subsequent grantee takes only that which is left in the grantor. Hence grantees and incumbrancers claiming in equity take and are ranked according to the date of their securities, and the maxim applies, '*Qui prior est tempore potior est jure.*' The first grantee is *potior* — that is, *potentior*. He has a better and superior — because a prior — equity." His Lordship then proceeded to explain the different classes of cases in which that defence is available, and the one which has been relied upon as bringing the case of the defendants within the decision of Lord Westbury is the third class, which is this, that "where there are circumstances that give rise to an equity as distinguished from an equitable estate — as, for example, an equity to set aside a deed for fraud, or to correct it for mistake — and the purchaser under the instrument maintains the plea of purchase for valuable consideration without notice, the Court will not interfere."

Now the question I have to determine is this, is the right of the parties to follow this money into the land an equitable estate or interest, or is it an equity as distinguished from an equitable estate? The decision of Lord Eldon many years ago appears to me to be perfectly conclusive upon the law. I refer to the case of *Lewis v. Madocks*, 17 Ves. 48, 57, where on further consideration directions had been given for an inquiry as to

certain trust moneys which had gone into land, the wife claiming an interest in the land as against the heir; and Lord Eldon said this: "The claim of the wife is put in this way, that personal property bound by the trust or obligation, whatever it is called, of this bond is traced into the purchase of a real estate, which estate must therefore be hers; but I do not know any case in its circumstances sufficiently like this to authorize me to hold that doctrine. I am prepared to say that the personal estate bound by this obligation, and which has been laid out in this real estate, is personal property that may be demanded out of the real estate; that the estate is chargeable with it; but it was not so purchased with it, that the estate should be decreed to belong not to the heir but to the wife." In other words, his Lordship held that the estate descended to the heir subject to the charge. That charge appears to me to be a charge in equity, or, in other words, an equitable estate or interest. Very similar was the question which Vice-Chancellor Kindersley had to determine in the case of *Rice v. Rice*, 2 Drew. 73. He had there to adjudicate between two equities, one arising from the right of an unpaid seller to come upon the land, and the other arising by contract creating an equitable mortgage. It is a very leading and instructive case, in which the Vice-Chancellor considered very fully the application of the maxim, "*Qui prior est tempore potior est jure*," and laid it down thus: "To lay down the rule with perfect accuracy, I think it should be stated in some such form as this. As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity, or, '*Qui prior est tempore potior est jure*.'" He then went on to consider and weigh the two equities set one against the other in that suit, and then he says: "Each of the parties in controversy has nothing but an equitable interest; the plaintiff's interest being a vendor's lien for unpaid purchase-money, and the defendant Ede having an equitable mortgage. Looking at these two species of equitable interests abstractedly and without reference to priority of time, or possession of the title deeds, or any other special circumstances, is there anything in their respective natures or qualities which would lead to the conclusion that in natural justice the one is better or more worthy or more entitled to protection than the other? Each of the two equitable interests arises out of the forbearance by the party of money due to him. There is, however, this difference between them, that the ven-

dor's lien for unpaid purchase-money is a right created by a rule of equity without any special contract; the right of the equitable mortgagee is created by the special contract of the parties. I cannot say that in my opinion this constitutes any sufficient ground of preference, though, if it makes any difference at all, I should say it is rather in favor of the equitable mortgagee, inasmuch as there is no *constat* of the right of the vendor to his lien for unpaid purchase-money until it has been declared by a decree of a Court of Equity, whereas there is a clear *constat* of the equitable mortgagee's title immediately on the contract being made. But I do not see in this any sufficient ground for holding that the equitable mortgagee has the better equity."

In my judgment, the right of a vendor for the unpaid purchase-money is an equitable lien, and the right of the *cestuis que trust*, whose trust money has been invested in the lands, is also an equitable lien. I do not think I can really distinguish this equity from such an equitable lien as the Vice-Chancellor held to be in that case an equitable estate or interest of the same description as the equity of an equitable mortgagee. Therefore, I shall conclude that, within the case of *Phillips v. Phillips*, the interest of the plaintiff in this case is an equitable interest, and not merely an equity like the equity to set aside a deed, and therefore it must take its priority according to the priority of date.¹

DUNCAN TOWNSITE COMPANY v. LANE,
SECRETARY OF THE INTERIOR.

SUPREME COURT OF THE UNITED STATES. 1917.

245 U. S. 308.

BRANDEIS, J. This is a petition for a writ of mandamus brought in the Supreme Court of the District of Columbia to

¹ [Beckett v. Cordley, 1 Bro. C. C. 353]; Daubeney v. Cockburn, 1 Mer. 626; *Re* Vernon, 33 Ch. Div. 402; 32 Ch. D. 165 (*semble*); Carritt v. Real Co., 42 Ch. D. 263; [Henry v. Black, 213 Pa. 620], *accord*.

Sturge v. Starr, 2 M. & K. 195; Lane v. Jackson, 20 Beav. 535; Penny v. Watts, 2 De G. & Sm. 501; *Re* French's Est., 21 L. R. Ir. 283, *contra*. — AMES.

In *Cloutte v. Storey*, [1911] 1 Ch. 18, a donee of a power of appointment of an equitable interest among a class having appointed fraudulently to a member of the class who sold the equitable interest to a *bona fide* purchaser, it was held that the *bona fide* purchaser does not prevail over the person entitled in default of appointment. See 24 Harv. L. Rev. 490. Cf. 12 Col. L. Rev. 156.

compel the Secretary of the Interior to restore the name of Nicholas Alberson, deceased, to the rolls under the Choctaw-Chickasaw Agreement of July 1, 1902 (32 Stat. 641), and to execute and record a patent for land described in an allotment certificate issued in his name by the Dawes Commission.

Under that act only the names of persons alive September 25, 1902, were entitled to entry on the rolls. Alberson had died before that date. The entry of his name and the issue of the certificate were procured by fraud and perjury. These facts, now conceded, were established by the Commission to the Five Civilized Tribes; and the Secretary of the Interior upon recommendation of the Commission removed Alberson's name from the rolls, held the certificates for cancellation and allotted the land to others. Notice of the hearing before the Commission was given to Alberson's administrator and attorney of record, but not to the relator, who had, under the Oklahoma law, recorded the deed assigning the certificates and was in actual possession of the premises. The certificates had issued on or before April 7, 1906. The notation removing Alberson's name from the rolls was made January 11, 1908. The relator purchased the certificates before January 11, 1908, for value in good faith without knowledge of the fraud or notice of the proceedings for cancellation hereinbefore referred to. The Supreme Court entered judgment for the relator, commanding issue and record of the patent, but making no order in respect to restoring Alberson's name to the rolls. The relator acquiesced in the judgment; but on writ of error sued out by respondent the judgment was reversed by the Court of Appeals (44 App. D. C. 63); and the relator brings the case here on writ of error.

The nature of the Choctaw-Chickasaw Agreement and the rights incident to enrollment and allotment have been frequently considered by this court. Enrollment confers rights which cannot be taken away without notice and opportunity to be heard. *Garfield v. Goldsby*, 211 U. S. 249. Certificates of allotment, like receiver's receipts under the general land laws, entitle the holder to exclusive possession of the premises; *Act of July 1, 1902, § 23*, 32 Stat. 641-644; *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337-8. But enrollment and certificates may be cancelled by the Secretary of the Interior for fraud or mistake, *Lowe v. Fisher*, 223 U. S. 95; because although the equitable title had passed, *Michigan Land and Lumber Co. v.*

Rust, 168 U. S. 589, 593, the land remains subject to the supervisory power of the Land Department, *Knight v. Lane*, 228 U. S. 6, until issue of the patent, *United States v. Wildcat*, 244 U. S. 111, unless under the statute the power expires earlier by lapse of time. *Ballinger v. Frost*, 216 U. S. 240. Under § 5 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, the legal title can be conveyed only by a patent duly recorded. *Brown v. Hitchcock*, 173 U. S. 473, 478. The provision in § 23 of the Act of July 1, 1902, that "allotment certificates issued by the Commission to the Five Civilized tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein" has relation to rights between the holder and third parties. The title conferred by the allotment is an equitable one, so that supervisory power remained in the Secretary of the Interior.

We are not required to decide whether (as suggested in *Lowe v. Fisher*, 223 U. S. 95, 107) the power to remove Alberson's name from the rolls had, because of § 2 of the Act of April 26, 1906, expired before the Secretary acted. For the Supreme Court of the District did not order the name restored, and its judgment was acquiesced in by the relator. The claim which the relator makes in this court rests wholly upon the fact that the relator was a *bona fide* purchaser for value. But the doctrine of *bona fide* purchaser for value applies only to purchasers of the legal estate. *Hawley v. Diller*, 178 U. S. 476, 484. It "is in no respect a rule of property, but a rule of inaction." *Pomeroy*, *Equity Jurisprudence*, §743. It is a shield by which the purchaser of a legal title may protect himself against the holder of an equity, not a sword by which the owner of an equity may overcome the holder of both the legal title and an equity. *Boone v. Chiles*, 10 Pet. 177, 210.

Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one; to compel the performance of a duty which ought to be performed, not to direct an act which will work a public or private mischief or will be within the strict letter of the law but in disregard of its spirit. Although classed as a legal remedy, its issuance is largely controlled by equitable principles. The relator having itself only an equity seeks the aid of the court to clothe it with the legal title as against the United States, which now holds both the legal title and the equity to have

set aside an allotment certificate secured by fraud. A writ of mandamus will not be granted for such a purpose. See *Turner v. Fisher*, 222 U. S. 204. The judgment of the Court of Appeals is

*Affirmed.*¹

HILL *v.* PETERS.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1918.

[1918] 2 Ch. 273.

ACTION WITH WITNESSES.

The plaintiffs in this action were R. Middleton Hill and A. Barker Basset, the executors and trustees of the will of Mrs. L. A. Gwyn; and the defendant, Mrs. Mary Jane Peters, was executrix and residuary legatee of her husband, P. H. Peters. The plaintiffs and the defendant respectively claimed to be entitled to a charge upon the same premises, and the question of priority arose.

The facts were not in dispute at the trial, and are taken from the judgment of the Court.

On September 29, 1897, Howell Powell Edwards and John Scott Heron, partners in the late firm of Edwards & Heron, solicitors, purported to advance out of moneys belonging to them on a joint account the sum of 4000*l.* to one Sydney Gotto on the security of his one undivided fifth share in the residuary personal estate of his father expectant on the death of his mother, then and still living. Notice of this mortgage was given to the trustees of the father's will on October 13, 1897. At or about the same time Edwards & Heron were about to complete a sale of property belonging to other clients, Philip Hall Peters (since deceased) and his wife, in respect of which a sum of 4800*l.* would be receivable by them on behalf of Mr. and Mrs. Peters. On October 18, 1897, Edwards wrote on behalf of his firm to Mr. Peters: "I enclose you a note of the securities which we have taken up for 4000*l.* as it would not wait, and which you can have if you like, until you are ready for the money to invest elsewhere." No document was identified as the inclosure, nor was any copy of Mr. Peters' reply to that letter produced;

¹ *Taylor v. Weston*, 77 Cal. 534, *accord*.

If A agrees to sell land to B and B transfers his equitable interest to C, C will of course take subject to A's lien for the purchase price. B cannot convey more than he has. *Polk v. Gallant*, 2 Dev. & B. Eq. (N. C.) 395; *La Belle Coke Co. v. Smith*, 221 Pa. 642; *Stoner v. Hanis*, 81 Va. 451. *Cf.* *Dupont v. Wertheman*, 10 Cal. 354.

but its purport appeared from a receipt dated October 20, 1897, wherein the firm acknowledged having received from Philip H. Peters and wife the sum of 4800*l.* "for advance to Sydney Gotto 4000*l.* at two months' notice, and to repay trustees 800*l.*" On the same day Edwards & Heron executed a declaration of trust declaring themselves trustees of the Gotto mortgage debt and interest, and the security created by the mortgage of September 29, for Mr. and Mrs. Peters as joint tenants, and covenanted at any time, on request, to repay the 4000*l.* on two months' notice. On January 14, 1907, Edwards & Heron, through the agency and with the assistance of one Ernest Tompkins, raised the sum of 4000*l.* from another client, Mrs. L. A. Gwyn, a widow, on the security of Sydney Gotto's one-fifth, concealing from the mortgagee the existence of the declaration of trust in favour of Mr. and Mrs. Peters, and not disclosing to her the fact that Tompkins had no interest in the property, although posing as the mortgagor, and that his apparent title thereto was founded on a fictitious sale and assignment to one Ponsford, which sale and resale were alleged in paragraphs 3, 4, and 5 of the statement of claim. In February, 1907, Edwards & Heron paid off 2000*l.* to Mr. and Mrs. Peters. Down to that date they paid interest on the 4000*l.* to Mr. and Mrs. Peters, and thereafter, down to the death of Edwards in January, 1917, they paid interest on the 2000*l.* to Mr. Peters, and after his death in February, 1911, to Mrs. Peters. Mrs. Gwyn died in August, 1911. Edwards & Heron paid interest on the 4000*l.* advanced by her to Mrs. Gwyn during her lifetime and, after her death, to the plaintiffs, as her executors, down to the death of Edwards. In 1912 the plaintiffs obtained possession of the mortgage deed of September 29, 1897, of a fictitious and incomplete assurance to Tompkins of November 9, 1906, and of the mortgage to their testatrix. On July 6, 1917, they gave notice of the mortgage to their testatrix to the surviving trustee of Mr. Gotto's will, and in December, 1917, they learnt for the first time of the existence of the declaration of trust in favour of Mr. and Mrs. Peters.

In these circumstances the plaintiffs brought this action against Mrs. Peters, claiming a declaration of priority for the 4000*l.* advance made by their testatrix over the defendant's outstanding 2000*l.* The claim in the writ and statement of claim was based upon the assumption that the sales to and by Ponsford were genuine and real transactions, but, this assumption having been shown to be fallacious, the plaintiffs by their

reply alleged that Mr. and Mrs. Peters had enabled Edwards & Heron to deal with the security of September 29, 1917, as absolute owners, (1.) by their conduct in taking a declaration of trust as security for the advance of 4000*l.* instead of an assignment of the mortgage of September 29, 1897; (2.) in permitting Edwards & Heron to retain possession of the mortgage deed; (3.) in omitting to have any notice of the declaration of trust indorsed on the mortgage deed; and (4.) in omitting to give any notice of the declaration of trust or of their interest in the mortgage security to Gotto's trustees.

EVE, J., after stating the facts substantially as set out above, continued: By their reply the plaintiffs have raised an alternative case, and rely upon four grounds as sufficient to displace the priority which the relative dates of the declaration of trust in favour of Mr. and Mrs. Peters and the mortgage to Mrs. Gwyn would confer upon the defendant. The first ground is that Mr. and Mrs. Peters, being absolute owners of the 4000*l.*, ought not to have constituted Edwards & Heron trustees for them of the security, but ought to have taken it in their own names either originally or by assignment and transfer from Edwards & Heron. The second ground is that, having constituted Edwards & Heron trustees of the security, they ought not to have left the security in the possession of the trustees. The third is that, having so left it, they ought to have insisted that there should be indorsed upon the mortgage deed notice of the declaration of trust, or of their interest in the moneys thereby secured. There is another and fourth ground which I will deal with separately, but, so far as the three grounds which I have enumerated are concerned, I do not consider that there is any substance in them.

There is nothing to prevent an individual, if he is so minded, from vesting any item of his property in another person as a trustee, and if he so does, the trustee is the proper custodian of the documents of title and other indicia of ownership. Moreover, the settlor is justified in adopting an attitude consistent with a belief on his part in the honesty of the individual whom he has appointed trustee. He is entitled to act on the footing that he has selected an honest man for the position, and not the less so because the person selected happens to be his own solicitor. Further, it is contrary to well-recognized practice to introduce into the transaction any notice of the existence of the trust by an indorsement on the title deeds or otherwise. If author-

ity is needed for these several propositions, it is to be found in *Cory v. Eyre*, 1 D. J. & S. 149, 165, *In re Richards*, 45 Ch. D. 589, 594, 595, *Shropshire Union Railways and Canal Co. v. Reg.*, L. R. 7 H. L. 496, 507, 508, *Bradley v. Riches*, 9 Ch. D. 189, and *Carritt v. Real and Personal Advance Co.*, 42 Ch. D. 263, 269, 270.

The suggestion as to the propriety of indorsing notice on the security in the hands of the trustee was put forward in more than one of these cases, particularly in *Bradley v. Riches*, and in this connection it is not altogether immaterial to point out that in the mortgage deed of September 29 the mortgagees are recited as making the advance out of moneys belonging to them on a joint account, a statement calculated to some extent to raise a presumption that it was raised out of trust moneys, seeing that there is in fact no reference in the document to the moneys constituting any partnership investment. It may be, therefore, that the plaintiffs' testatrix, had she investigated the matter by independent solicitors, would have been put on inquiry and might then have come to learn the sources from which the moneys were obtained to make the advance. But the matter is not worth pursuing, as I am satisfied that there was no negligence on the part of Mr. and Mrs. Peters in forbearing to have the mortgage deed indorsed, as it is suggested they ought to have done.

The fourth ground upon which the plaintiffs rely is that Mr. and Mrs. Peters ought to have given notice of the declaration of trust, or of their interest in the mortgage security, to the trustees of the will of the elder Mr. Gotto. That ground is based upon the assertion, first, that the transaction between Edwards & Heron and Mr. and Mrs. Peters was in fact an equitable assignment, and not the creation of a trust, and, secondly, upon this wider ground, that, even if the true character of the transaction was the creation of a trust, the title of the defendant and her husband as *cestuis que trust* under the declaration could only be perfected, according to the rule in *Dearle v. Hall*, 3 Russ. 1, by notice to the trustees of the will of the elder Mr. Gotto. No such notice having been given, the plaintiffs claim that their security, of which notice was given on July 6, 1917, although posterior in date, is entitled to priority over the defendant's. In my opinion, the declaration of trust was not an assignment or transfer, but the creation of the relationship of trustee and *cestui que trust* as between Edwards & Heron

and Mr. and Mrs. Peters. I see nothing in the deed, or in any of the documents produced, to warrant me in treating the transaction as one of any other character, or having any other effect. The proposition that the beneficiaries' title under the declaration required perfecting by notice is a very startling one, for which no authority has been cited, and which, as Mr. Adams frankly admitted, leads to this result — that whenever the trustees hold a chose in action of this nature as part of the trust estate each of the beneficiaries must give notice of his beneficial interest therein, or run the risk of being deprived thereof by some fraudulent transaction between his trustee and an assignee who does give notice. I cannot see any reason whatever for so extending the doctrine of *Dearle v. Hall*. I respectfully indorse the observations of Lord Macnaghten in *Ward v. Duncombe*, [1893] A. C. 369, as to the undesirability of doing anything to extend that doctrine to cases which are not already covered by it. The principle on which the rule in *Dearle v. Hall* is founded, which regards the giving of notice by the assignee as the nearest approach to the taking of possession, has no application, in my opinion, to the beneficiary who has no right to possession himself, and who can only assert his claim to receive through his trustee.

I confess I could have followed a suggestion that Mr. and Mrs. Peters ought possibly to have given notice to Sydney Gotto, the mortgagor; but this naturally has not been advanced, as the plaintiffs themselves have not given any such notice, and, even had they done so, it would not, in my opinion, have availed to give priority to their subsequent security. I do not think there is any more substance in the point founded on *Dearle v. Hall*, 3 Russ. 1, than in the other three points advanced in the reply.

The position, therefore, can be summed up shortly thus: Edwards & Heron, trustees for the defendant of an equitable interest in personalty, in breach of trust, in fraud of their *cestuis que trust* and for their own purposes, without disclosing the existence of the trust, purported to assign the interest by way of mortgage to the testatrix, and afterwards, in further breach of trust, handed over to her executors the instrument creating the interest. In so doing they have not displaced the defendant's priority: see *Cory v. Eyre*, 1 D. J. & S. 149, already referred to, and *In re Vernon*, *Ewens & Co.*, 32 Ch. D. 165, 33 Ch. D. 402. The defendant has not done, or omitted to do, anything to forfeit that priority, and the *bona fides* of the testatrix

which is in no way impugned, does not avail to place her later equity in a superior position to the earlier one of the defendant.

The result is that the action fails and must be dismissed with costs. The defendant is entitled on her counter-claim to a declaration of priority and the delivery up to her of the mortgage of September 29, 1897, and the plaintiffs must pay the costs of the counter-claim.

NEWMAN v. NEWMAN.

CHANCERY. 1885.

28 Ch. D. 674.

IN the year 1869 a lease of the New Dynevor Colliery was made to certain persons, one being Michael Lewis Brown, who took three-eighths of the colliery, as to one moiety thereof for himself, and as to the other moiety in trust for Edwin Newman.

In 1871 Brown had made large advances for the colliery and to Edwin Newman, and pressed for payment. By a deed made in July, 1871, after reciting that Edwin Newman had a policy on his life for 3,000*l.*, and had assigned that and also his share in the colliery to his wife's mother, Sophie Storie Armstrong, by way of security for 5,700*l.*, it was witnessed that Mrs. Armstrong and Edwin Newman assigned the policy and Edwin Newman's one moiety of three-eighths of the colliery to Brown by way of security for the repayment to him of 3,180*l.*, and subject thereto for Mrs. Armstrong.

Edwin Newman was dead, and a sum representing the 3,000*l.* due under the policy had been paid into Court. Brown had sold the shares in the colliery, and had a balance of 850*l.* arising from the sale.

This action was brought by Violet Ida Newman, one of the children of Edwin Newman, against Brown and against the administrator of Mrs. Armstrong (who was dead), claiming as against Brown that a certain sum of 5,700*l.* had priority over his charge on the colliery shares and on the policy money; and that he might be declared a trustee of the colliery shares as to the 5,700*l.* The plaintiff's case was as follows:—

By an indenture of settlement dated the 24th of September, 1856, made on the marriage of Edwin Newman with Mrs. Armstrong's daughter, certain funds were assigned to three trustees on the usual trusts for Mrs. Newman, Edwin Newman, and their children, of whom the plaintiff, Violet Ida Newman, was one.

The other trustees died or retired, and in 1866 Mrs. Armstrong was appointed sole trustee. The dealings as to the trust funds between Mrs. Armstrong and Edwin Newman were very complicated and obscure, but it was clear that Edwin Newman had borrowed more than 5,000*l.* of the trust money from Mrs. Armstrong; and, according to the case of the plaintiff, the 5,700*l.* due by Edwin Newman to Mrs. Armstrong, as stated in the mortgage to Brown, was the fund so borrowed and was subject to the trusts of the settlement; and then the shares in the colliery and the policy had been assigned by Edwin Newman to Mrs. Armstrong by way of security for the trust money which had been advanced by her to Edwin Newman.

Brown alleged that he took his charge without any notice whatever of the settlement, and that he thought and still believed that the 5,700*l.* was the money of Mrs. Armstrong. . . .

NORTH, J., after fully stating the complicated facts, and referring to the obscurity of the transactions, continued:—

Now out of that state of facts the questions between the parties arise in this way. First, as regards the shares in the colliery, and, secondly, as regards the policy moneys, which stand in rather different positions.¹ As to the colliery, the question is whether, assuming the 5,700*l.* to have been trust money, Brown's charge is prior or subsequent to the charge of the 5,700*l.* It is quite clear that Brown had no notice whatever of the money being trust money, if in fact it was. [His Lordship then referred to some of the evidence.] Therefore it comes to this. Brown has got the legal estate, and he had it prior to the charge in 1871. He took that security without notice of any prior charge. But then it is said that there was already a charge in favor of Mrs. Armstrong, and that the plaintiff for whom she was trustee and who claims under her has a charge prior to Brown's. Brown's answer to that is: "I have the legal estate; and I had no notice of any trust actual or constructive. There was nothing whatever to put me upon any inquiry. I dealt with persons who represented this property to be their own, and I had no notice of any sort that either of them was a trustee. I have clearly got a good charge and I have the legal estate. I cannot now be told that my interest is to be postponed to the plaintiff's when I had the legal estate and dealt with the only persons I knew or could know." It appears to

¹ So much of the case as relates to the policy moneys is omitted, as well as the arguments of counsel.

me that even if the 5,700*l.* is trust money he is entitled to succeed upon that defence.

The cases in which a second equitable incumbrancer without notice has got in the legal estate and has protected himself are very numerous and well-known. But it is said that the present does not come within these cases, because Brown was the trustee of the leasehold interest, and held it in trust for the real owners whoever they were; and that he cannot be heard to say that his own charge which was subsequent in date ought to have priority over the charges of the persons for whom he is trustee. But he is trustee without any notice whatever of any charge, and he dealt with persons who were treated throughout as the only persons interested in the estate. Is there anything to prevent a trustee from dealing with his only known *cestui que trust*, and then taking advantage of the legal estate which he does not get in afterwards but has already?

There are two cases to which I will refer. One is *Phipps v. Lovegrove*, L. R. 16 Eq. 80. The Lord Justice James, sitting for Vice-Chancellor Wickens, says in his judgment: "The trustees at the request and by the direction of the only *cestuis que trust* of whom they had any notice or knowledge whatever, dealt with the funds; and it appears to me, upon more than one ground, that any person claiming under the same *cestuis que trust* has no right to make any claim against them. It is a rule and principle of this Court, and of every Court, I believe, that where there is a *chose in action*, whether it is a debt or an obligation, or a trust fund, and it is assigned, the person who holds that debt or obligation, or has undertaken to hold the trust fund, has, as against the assignee, exactly the same equities that he would have as against the assignor. Down to the date at which the notice of assignment was given to the trustees, the trustees were at liberty to deal with the fund, and to have equities created in their favor by the *cestuis que trust*, until they received notice that some other person had come in and displaced those equities. An insurance office might lend money upon a policy of insurance to a person who had insured his life, notwithstanding any previous assignment by him of the policy, of which no notice had been given to them. Trustees who have got a legal estate, or an estate of any kind, either money or land, may lend money to the *cestuis que trust*, and get a beneficial interest in the trust property, if they have no notice that there have been any prior incumbrances. They have got the legal estate and they have

got the legal right; they have therefore got, in respect of the charge created in their favor, before they have got any notice of anything else, a right to retain that which the law has given them." Now it is admitted that this is quite in point, but it was said that the passage referring to trustees who have got the legal estate is merely an illustration by way of *dictum*, and is not necessary for the decision of the case. To a certain extent that is true, but it is an illustration in point and bears upon what the learned judge decided, and it shows his opinion upon the matter to be that a trustee who had got the legal estate could deal with the *cestui que trust* by buying his interest or making an advance, and could maintain that charge against a prior incumbrancer on the ground that he held the legal estate, provided always that it was without notice.

The case of *Browne v. Savage*, 4 Drew. 635, seems to me very much in point, though it does not refer to the legal estate. There Kindersley, V. C., decided that an assignment by one trustee to another gave that trustee notice, and that at any rate during the life of that trustee the notice so given was all that was necessary, and so it has been held in subsequent cases, of which *Willes v. Greenhill*, 29 Beav. 376, is one. The fact that the trustee to whom the assignment was made gave no notice till afterwards to the third trustee was immaterial. It was held that the trustee was competent to deal with the *cestui que trust*, and to get a good charge in priority to other charges of which he had no notice, though he was trustee of the fund for the owners of it, including persons in favor of whom charges had been made of which notice had not been given.

Some little doubt has been thrown upon that case by the remark of Lord St. Leonards in a note to Vendors and Purchasers (14th ed. p. 379). He says: "There is a mistake in the dates; they do not agree with the priorities ordered." But I have looked very carefully at the case, and it seems to me that the note by Lord St. Leonards is inaccurate, and he seems to have confused the notices, and to have thought that the notice given by the second trustee to the third on the 30th of July, 1858, was the ruling notice, whereas the true ruling notice as regards the mortgage of 1858 by Savage to the second trustee was not of that date, but was the assignment itself, which was dated the 29th of March, 1858. It seems to me that the decision of Kindersley, V. C., was quite accurate, and that the priorities were given according to what he decided to be the right order

of the notices. It appears to me, therefore, upon these authorities, that the trustee is entitled to hold the leasehold interest as security for what is due to him in priority to any claim by any *cestui que trust*, even assuming the 5,700*l.* to have been trust money.¹ . . .

¹ Similarly where a first mortgage is given to secure present and future advances, and the mortgagee makes subsequent advances in ignorance of an intervening second mortgage, he is entitled to repayment of the subsequent advances in priority to the intervening mortgage. *Liverpool etc. Co. v. Wilson*, 7 Ch. 507; *Tapia v. Demartini*, 77 Cal. 383; *Frye v. Bank*, 11 Ill. 367; *Ward v. Cooke*, 17 N. J. Eq. 93; *Truscott v. King*, 6 Barb. 346, 6 N. Y. 147; *Ackerman v. Hunsecker*, 85 N. Y. 43; *McDaniels v. Colvin*, 16 Vt. 300. Cf. *Young v. Young*, L. R. 3 Eq. 801 (further advance to heir of mortgagor in ignorance of devise of equity of redemption). See *AMES*, 339n.

But the first mortgagee is not so entitled if he made the subsequent advances with notice of the intervening mortgage (*Hopkenson v. Rolt*, 9 H. L. C. 514; *Freeman v. Laing*, [1899] 2 Ch. 355; *Boswell v. Goodwin*, 31 Conn. 74), unless he had previously contracted to make such advances. *West v. Williams*, [1898] 1 Ch. 488; *Brinkmeyer v. Browneller*, 55 Ind. 487. See *Jones, Mortgages*, 7 ed., secs. 364-378.

"Under certain circumstances one who advances money upon the security of property, upon which two mortgages have already been given, is justly entitled to outrank the second mortgagee. For example, M. has made a first mortgage for \$5,000 to A., and a second mortgage for \$5,000 to B. A. desiring his money, M. proposes to C. that he shall advance \$10,000, paying \$5,000 to A., and taking a conveyance from him, and paying the other \$5,000 to M. If C. makes the advance of \$10,000 in the manner suggested, and has no notice of B.'s mortgage, he may fairly claim priority over B. *Peacock v. Burt*, 4 L. J. Ch. n. s. 33, was such a case. This is not a case of tacking, nor of *tabula in naufragio*. The transaction is the same in substance as if A. had reconveyed to M., and M. had then made a legal mortgage for \$10,000 to C. *Carlisle Co. v. Thompson*, 28 Ch. D. 398, was similar to *Peacock v. Burt*, except that C. was not a mortgagee, but a purchaser." *AMES*, *Lect. Leg. Hist.*, 268.

In *Jenkinson v. N. Y. Finance Co.*, 79 N. J. Eq. 247, it was held that if the *cestui que trust* makes an assignment of his interest and then borrows a part of the trust fund from the trustee who has no notice of the assignment, the assignee takes subject to the trustee's right to deduct the amount loaned. See also *Re Knapman*, 18 Ch. D. 300. Cf. *Bolton v. Curre*, [1895] 1 Ch. 544.

Conversely the trustee is safe in paying an assignee of the equitable interest who obtained the assignment by fraud, if the trustee has no notice of the fraud. *Lovato v. Catron*, 20 N. Mex. 168; L. R. A. 1915E 451.

But if the trustee by mistake pays one who has never been authorized by the *cestui que trust* to receive payment, the trustee is liable to the *cestui que trust*. *Perry, Trusts*, sec. 927.

A trustee paying the assignee of an equitable *chose* in action when he should know of a prior equity, because it appears on the face of the assignment, is liable to the person holding the prior equity. *Davis v. Hutchings*, [1907] 1 Ch. 356.

THIRD NATIONAL BANK *v.* LANGE.

COURT OF APPEALS, MARYLAND. 1879.

51 Md. 138.

APPEAL from the Circuit Court of Baltimore City.

This was a proceeding in equity by the appellee, Lange, against the appellant and others, to enjoin the appellant from collecting or attempting to collect a promissory note, purchased by it, but equitably belonging to the appellee Lange, or from protesting it, or taking any further steps in regard thereto. The injunction ordered to be issued, was served upon the appellant three days before the maturity of the note. The case is further stated in the opinion of the Court.

The cause was argued before BARTOL, C. J., BRENT, MILLER, ALVEY, and ROBINSON, JJ.

BRENT, J. The note, about which this case has arisen, is as follows: —

“\$1100.

BALTIMORE, *Feby. 8th*, 1876.

Twelve months after date we promise to pay to the order N. W. Watkins, trustee, eleven hundred dollars with interest, value received.

FLYNN & EMERICH.”

The names of “N. W. Watkins, Trustee,” and “J. Regester & Sons,” are indorsed upon it.

This note was given for the purchase of property sold by N. W. Watkins, as trustee under a decree of the Circuit Court of Baltimore City, and is for one of the deferred payments, as authorized by that decree. At the time of its delivery to the trustee, it was indorsed by J. Regester & Sons as securities for the drawers, — the terms of sale requiring the deferred payments to be secured in that form.

Subsequently N. W. Watkins wrote above the names of J. Regester & Sons the indorsement “N. W. Watkins, Trustee,” and applied to the Union Banking Company to buy the note, offering to sell it for 12 per cent off. The Banking Company not being willing to buy it, its cashier offered to sell it for Watkins, and placed it in the hands of a bill broker for that purpose. After getting into the hands of a second bill broker it was taken by him to the Third National Bank, the appellant, and offered to it for sale. The bank bought it from the broker at nine per cent off, and the proceeds seem to have been appropriated by Watkins.

The appellees claim that the bank acquired no right to the note, while it is contended for the bank that the note is embraced in the class of *commercial* paper, and was acquired by it in a usual and proper way.

Without intending to decide upon the right of a national bank to purchase paper, as the question does not necessarily arise in this case, we do not think the note in question is within the class of paper known as commercial paper. Although like it in general form, the fact that it is payable to the order of Watkins, *trustee*, restricts its free circulation, and excepts it from some of the rules governing commercial paper.

No doctrine is better settled, than that a trustee has no power to sell and dispose of trust property for his own use and at his own mere will. One who obtains it from him or through him with actual or constructive notice of the trust, can acquire no title, and it may be recovered by suitable proceedings for the benefit of the *cestui que trust*. If there are circumstances connected with the purchase which reasonably indicate that trust property is being dealt with, they will fix upon the purchaser notice of the trust, and if he fails to make inquiry about the title he is getting, it is his own fault and he must suffer the consequences of his own neglect.

The general doctrine is stated in 1 Story's Eq. Juris., sec. 400, where it is said: "for whatever is sufficient to put a party upon inquiry, (that is, whatever has a reasonable certainty as to time, place, circumstances, and persons,) is, in equity, held to be good notice to bind him." A large number of authorities is referred to in the note, and it is unnecessary to allude to them more particularly.

In the case of the present note, it cannot be read understandingly without seeing upon its face that it is connected with a trust and is part of a trust fund. It was the duty of the bank, before purchasing it, to have made inquiry into the right of the trustee to dispose of it. But this it wholly failed to do, and as it turns out, he was disposing of the note in fraud of his trust, the bank must suffer the consequences of the risk it assumed.

In the case of *Shaw v. Spencer*, 100 Mass. 382, the question is considered, whether the addition of the word *trustee* to the name alone is sufficient to indicate a trust and put a party upon inquiry. That was the case of stock certificates, which were pledged by the holder as collaterals for certain acceptances. The certificates in question were in the name of E. Carter,

trustee. They were by him indorsed, and one of the questions presented was whether the word *trustee* was sufficient to put the holders upon inquiry, and thereby affect them with notice of the trust. The Court says on page 393, "The rules of law are presumed to be known by all men; and they must govern themselves accordingly. The law holds that the insertion of the word 'trustee' after the name of a stockholder does indicate and give notice of a trust. No one is at liberty to disregard such notice and to abstain from inquiry, for the reason that a trust is frequently simulated or pretended when it really does not exist. The whole force of this offer of evidence is addressed to the question, whether the word 'trustee' alone has any significance and does amount to notice of the existence of a trust. But this has heretofore been decided, and is no longer an open question in this commonwealth." And upon the ground that pledgees took the certificates with this notice of the trust, it was held that they could not retain them against the equitable owner, inasmuch as Carter, the trustee, had no authority to use or dispose of them for any such purpose.

The argument, that the bank should not be deprived of its action against J. Regester & Sons, whose indorsement it is claimed guarantees the preceding indorser, would be entitled to weight but for the facts of the case. While the rule is undoubted that a subsequent indorser guarantees the preceding indorsement, it cannot apply to a case where in fact there was no previous indorsement at the time of the alleged second indorsement. The obligations of J. Regester & Sons upon this note were those of original makers, *Ives v. Bosley*, 35 Md. 263, *Good v. Martin*, 95 U. S. 90, as is clearly shown by the proof in the case. Their name was placed upon the note as security, and they cannot be held to a contract of guaranty into which they never entered. That parol evidence is admissible to show the character in which they stand relative to this note is settled by the Supreme Court of the United States in the case of *Good v. Martin*, just referred to.

We are therefore very clearly of opinion, that the bank cannot hold Regester & Sons liable as guarantors. When the note is paid, their liability ceases.

We find no error in the decree of the Court below, and it will be affirmed.

*Decree affirmed with costs, and case remanded.*¹

¹ *Geyser-Marion etc. Co. v. Stark*, 106 Fed. 558; *Sternfels v. Watson*, 139 Fed. 505; *Sturtevant v. Jaques*, 14 Allen (Mass.) 523; *Gaston v. Amer.*

BISCHOFF v. YORKVILLE BANK.

COURT OF APPEALS, NEW YORK. 1916.

218 N. Y. 106.

COLLIN, J. The plaintiff has recovered a judgment against the defendant for the sum of \$13,329.04, apart from the sums of interest and costs. The basic facts as found are: In March, 1908, H. F. W. Poggenburg was appointed and qualified as executor of the will of Josephine F. Schneider, deceased. The plaintiff here became his successor in December, 1914, through his removal. In April, 1908, Poggenburg as executor deposited the moneys of the estate in the Bowery Bank in the city of New York in the name of "Estate of Josephine F. Schneider by H. F. W. Poggenburg, executor." He, as an individual, had at that time a deposit account with the defendant, Yorkville Bank. In April, 1908, he sent by mail to the defendant a check upon the Bowery Bank in the sum of five hundred dollars, payable to the

Exch. Nat. Bk., 29 N. J. Eq. 98; Gerard v. McCormick, 130 N. Y. 261; Rochester & C. T. R. Co. v. Paviour, 164 N. Y. 281, *accord*. Cf. Jones v. Williams, 24 Beav. 47. But see Titcomb v. Richter, 89 Conn. 230, *crit.* 29 Harv. L. Rev. 232. — ED.

A fortiori one who takes a conveyance from a person whose name is followed by the word "trustee" in the document of title, and with knowledge that he is making the conveyance for his personal advantage, for example, to satisfy or secure his own debt, cannot hold the property against the defrauded *cestui que trust*. Bank of Montreal v. Sweeny, 12 App. Cas. 617; Duncan v. Jaudon, 15 Wall. 165; Manhattan Bank v. Walker, 130 U. S. 267; Shaw v. Spencer, 100 Mass. 382; Smith v. Burgess, 133 Mass. 511; Payne v. First Bank, 43 Mo. Ap. 377, 383; Alexander v. Alderson, 7 Baxt. 403. — AMES.

If the purchaser uses due care in inquiring as to the extent of the trustee's authority, he is not liable if he purchases in good faith although the trustee in fact exceeded his authority. Grafflin v. Robb, 84 Md. 451; Mercantile Nat. Bk. v. Parsons, 54 Minn. 56.

If the trustee's authority is evidenced by an instrument in writing of which the purchaser knows, or which is recorded, the purchaser has failed to use due care if he has not examined the instrument. Marbury v. Ehlen, 72 Md. 206; Donnelly v. Alden, 229 Mass. 109; Stark v. Olsen, 44 Neb. 646; First Nat. Bk. v. National Broadway Bk., 156 N. Y. 459; Ludington v. Mercantile Nat. Bk., 102 N. Y. App. Div. 251.

On the general question of the liability of one who knowingly deals with a trustee, see Perham v. Kempster, [1907] 1 Ch. 373; Perry, Trusts, secs. 800, 814.

order of the defendant, signed "Estate of Josephine F. Schneider by H. F. W. Poggenburg, executor." The defendant received the check in due course, indorsed and transmitted it through the New York Clearing House to the Bowery Bank, which paid it out of the funds of the estate. The defendant placed the proceeds of it to the credit of Poggenburg in his individual account with the defendant. Between April, 1908, and November, 1911, the defendant received through the mail twenty-nine other checks identical, except as to date and amount, with that described (except that one was payable to the order of Poggenburg and by him indorsed payable to the order of the defendant, which counsel assume and we will assume has the character and effect of the others), and dealt with them as it did with that fully set forth. The findings describe with particularity the manner in which the officers and employees of the defendant, in creating the credits, dealt with the checks. The amounts of the checks aggregated \$14,005. Additional moneys from sources other than the estate were deposited by Poggenburg with the defendant and credited to him in his account during the interval involved. In April, 1908, the defendant owned the promissory note of Poggenburg for \$1,750, which matured June 3, 1908. On June 3, 1908, Poggenburg paid the defendant from his individual account with it, in which the amount standing to his credit was less than the proceeds of the estate checks theretofore deposited therein, \$765 upon the note, including interest, and renewed \$1,000 of the loan by a new note maturing September 1, 1908. On September 1, 1908, this note was paid the defendant in the same manner and under the like condition. In February, 1911, the defendant was paid, likewise, \$1,000 upon a note of Poggenburg held by it for the sum of \$2,000. The decree of the Surrogate's Court of April, 1915, by which Poggenburg was removed as the executor and his accounts as executor were settled, declared that he was liable to the estate for the aggregate sum of the thirty checks with interest. All of the funds so withdrawn by the executor from the Bowery Bank and deposited in and placed by the defendant to his individual credit were checked out by Poggenburg in payment of said notes, or for his personal purposes, except the sum of \$675.96. Throughout the transactions the defendant made no inquiry at any source as to the deposits of the checks of the executor or the withdrawals from the individual account with it. The judgment recovered by the plaintiff was for the sum of those funds,

less the \$675.96, with interest and costs. It was affirmed by the Appellate Division by a divided court. The dissenting justice declared that the recovery should have been only the sums Poggenburg paid the defendant. We have reached a conclusion differing from both.

The transfer of the funds of the estate to and the crediting of them by the defendant to Poggenburg, in his individual account, did not overpass the legal right of the executor or the defendant. The method was unwise and hazardous; it did not, however, in and of itself, constitute a conversion. The title to the funds was in the executor, and he possessed the full control and disposition of them. As executor, however, and not as an individual, and for the purposes of administration, was he thus empowered. For many purposes third persons are entitled to consider an executor the absolute owner of the personal assets in his hands. Although he holds the title to them, he holds it in trust to pay the debts and execute the will of the testator. In equity he is a mere trustee charged with the performance of the will. *Leitch v. Wells*, 48 N. Y. 585; *Blood v. Kane*, 130 N. Y. 514; *Smith v. Ayer*, 101 U. S. 320; *Hartnett v. Wandell*, 60 N. Y. 346. A fiduciary may legally deposit the trust funds in a bank to his individual account and credit.¹ Knowledge on the part of the bank of the nature of the funds received and credited does not affect the character of the act. The bank has the right to presume that the fiduciary will apply the funds to their proper purposes under the trust. There are judicial decisions, in cases in which the fiduciary has converted the funds, which hold the contrary. *United States Fidelity & Guaranty Co. v. People's Bank*, 127 Tenn. 720; *Bank of Hickory v. McPherson*, 102 Miss. 852. The rule stated by us is, however, established in this and other jurisdictions, as the decisions hereinafter cited will disclose, and accords with reason.

The acts of the executor and the defendant in depositing and crediting in the individual account of Poggenburg the proceeds of the checks did not affect the character of the trust funds. The form of each check, in which the defendant was payee, imported the ownership of the moneys represented in them by

¹ The authorities are practically unanimous in holding that a fiduciary who deposits trust funds in a bank in his individual account is liable if the bank should fail. *Re Arguello*, 97 Cal. 196, *post*. See a collection of cases in *Ann. Cas.* 1915C 50; 45 L. R. A. (n. s.) 1.

the executor, and informed the defendant that Poggenburg was depositing with it moneys which were not his and were the executor's. *Squire v. Ordemann*, 194 N. Y. 394; *Ward v. City Trust Co.*, 192 N. Y. 61; *Cohnfeld v. Tanenbaum*, 176 N. Y. 126. The defendant knew at all times that the credits created by the deposits of those moneys, through the checks of the executor, were equitably assets of the estate and owned by the executor. Trust funds do not lose their character as such by being deposited in a bank for the individual credit and account of the person who is trustee. It may be stated as a general principle that if money deposited in a bank was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his individual bank account. *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411; *National Bank v. Insurance Co.*, 104 U. S. 54; *Roca v. Byrne*, 145 N. Y. 182.

Inasmuch as the defendant knew that the credits to Poggenburg created by the proceeds of the checks were of a fiduciary character and were equitably owned by the executor, it had not the right to participate in a diversion of them from the estate or the proper purposes under the will. Its participation in a diversion of them would result from either (a) acquiring an advantage or benefit directly through or from the diversion, or (b) joining in a diversion, in which it was not interested, with actual notice or knowledge that the diversion was intended or was being executed, and thereby becoming privy to it. *Ward v. City Trust Co.*, 192 N. Y. 61; *Squire v. Ordemann*, 194 N. Y. 394; *Union Stock Yards Bank v. Gillespie*, 137 U. S. 411; *National Bank v. Insurance Co.*, 104 U. S. 54; *Allen v. Puritan Trust Co.*, 211 Mass. 409. In the case last cited it is stated: "The principle governing the defendant's liability is, that a banker who knows that a fund on deposit with him is a trust fund cannot appropriate that fund for his private benefit, or where charged with notice of the conversion join in assisting others to appropriate it for their private benefit, without being liable to refund the money if the appropriation is a breach of the trust," and numerous decisions are cited. (p. 422.) A bank does not become privy to a misappropriation by merely paying or honoring the checks of a depositor drawn upon his individual account in which there are, in the knowledge of the bank, credits created by deposits of trust funds. The law does not require the bank, under such facts, to assume the hazard

of correctly reading in each check the purpose of the drawer, or, being ignorant of the purpose, to dishonor the check. The presumption is, and after the deposits are made remains until annulled by adequate notice or knowledge, that the depositor would preserve or lawfully apply the trust funds. The contract, arising by implication of law, from a general deposit of moneys in a bank is, that the bank will, whenever required, pay the moneys in such sums and to such persons as the depositor shall direct and designate. Although the depositor is drawing checks which the bank may surmise or suspect are for his personal benefit, it is bound to presume, in the absence of adequate notice to the contrary, that they are properly and lawfully drawn. Adequate notice may come from circumstances which reasonably support the sole inference that a misappropriation is intended, as well as directly. *Safe Deposit & Trust Co. v. Bank*, 194 Pa. St. 334; *Batchelder v. Central National Bank*, 188 Mass. 25; *United States Fidelity & Guaranty Co. v. Home Bank for Savings*, 88 S. E. Rep. 109; *Brookhouse v. Union Publishing Co.*, 73 N. H. 368; *Freeholders of Essex v. Newark National Bank*, 48 N. J. Eq. 51; *Havana Central R. R. Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422.

In the present case Poggenburg paid to the defendant, as his creditor, on June 3, 1908, the sum of \$765 from his account with the defendant. The finding of the trial court, supported by the evidence, is that the account at that time was constituted wholly from the trust funds. At that time and through the transaction the defendant knew that Poggenburg had appropriated \$765 of those funds for his private benefit. The presumption that he would not thus violate his duty and lawful right — that he would apply the moneys to their proper purposes under the will then ceased to exist. There was absolute proof in the possession of the defendant to the contrary. The defendant had no longer the right to assume that in paying the checks of Poggenburg it was paying the executor's moneys to the executor and not to Poggenburg, the individual, or that Poggenburg would use the moneys lawfully. It had knowledge of such facts as would reasonably cause it to think and believe that Poggenburg was using the moneys of the executor for his individual advantage and purposes. Those facts indicated that the payment to it was not an isolated incident; they indicated, rather, that it was within a method or system. Having such knowledge, it was under the duty to make reasonable inquiry

and endeavor to prevent a diversion. Having such knowledge, it was charged by the law to take the reasonable steps or action essential to keep it from paying to Poggenburg as his own the moneys which were not his and were the executor's, and was bound by the information which it could have obtained if an inquiry on its part had been pushed until the truth had been ascertained. It did nothing of that sort, and by supinely paying, under the facts here, as found, the subsequent checks of Poggenburg, it became privy to the misapplication. It must now pay the plaintiffs the moneys of the estate which it had and received on and after June 3, 1908. *Allen v. Puritan Trust Co.*, 211 Mass. 409; *Duncan v. Jaudon*, 15 Wall. 165.

What we have written makes clear, we think, the distinction between the instant case and that of *Havana Central Railroad Co. v. Knickerbocker Trust Co.*, 198 N. Y. 422, upon which the defendant firmly relies.

We do not consider the question, because it is not here, as to whether or not a bank would be protected in honoring a check of a fiduciary depositor, regularly drawn upon his account as such fiduciary, and presented by him, even though it had actual notice that he would misappropriate the proceeds. The decisions are not uniform upon this question. The distinction between that question and the question *sub judice* is substantial. In the one, the bank pays, under its implied contract, the moneys to the rightful owner and the depositor; in the other, it pays the moneys to one who, as it knows, is not the rightful owner, after notice that the payee is converting them.

We have examined the other points of the appellant's brief and find nothing which requires discussion.

The trial court adjudged a recovery of the principal sum of \$13,329.04, the aggregate sum of the amounts of the thirty checks, less the sum of \$675.96, which was not misappropriated. Poggenburg had deposited with the defendant prior to June 3, 1908, \$2,300 of the trust funds. There was to his credit on that date \$1,298.65. Prior to that date, therefore, he had misappropriated \$1,001.35, to which action the defendant was not privy and for which it was not liable. It follows that the principal sum recovered should have been \$12,327.69, and the interest in the sum of \$3,000.35, computed as directed in the decision of the trial court.

The judgment should be modified accordingly and as modified affirmed, without costs to either party.

WILLARD BARTLETT, Ch. J., CHASE, CUDDEBACK, CARDOZO, SEABURY and POUND, JJ., concur.

*Judgment accordingly.*¹

APPLICATION OF PURCHASE MONEY.—The payment of the purchase money to a trustee authorized to sell, has always been treated as a valid discharge of the purchaser at law. But there were formerly many instances where the purchaser, who had paid the trustee, continued liable in equity if the money paid was not duly applied for the benefit of the *cestui que trust*. This highly artificial doctrine would seem to be indefensible on any principle. Its inconvenience as a working rule became so intolerable that the whole doctrine has been swept away by statute in England, New York and other jurisdictions. In some of our states the doctrine never obtained a foothold in the equity courts. The old learning on this point may be found in Lewin, *Trusts*, 535 *et seq.*; 2 Perry, *Trusts*, secs. 790 *et seq.* [See Mass. St. 1918, c. 68.] — AMES.

As to the liability of a corporation to see to the execution of a trust of its shares, see 3 Mass. L. Quar. 284.

¹ If a trustee or other fiduciary deposits trust funds in a bank which has notice of the trust and if the depositor is or becomes personally indebted to the bank, the bank has no lien upon the fund or right of set-off or right to receive payment out of the fund. *Gray v. Johnston*, L. R. 3 H. L. 1; *Ex parte Kingston*, L. R. 6 Ch. App. 632; *Cuthbert v. Robarts Lubbock & Co.*, [1909] 2 Ch. 226; *National Bk. v. Insurance Co.*, 104 U. S. 54; *United States F. & G. Co. v. Union Bk. & T. Co.*, 228 Fed. 448; *Sayre v. Weil*, 94 Ala. 966; *Lowndes v. City Nat. Bk.*, 82 Conn. 8; *American Trust & Banking Co. v. Boone*, 102 Ga. 202; *Farmers etc. Bk. v. Fidelity & Dep. Co.*, 108 Ky. 384; *Allen v. Puritan T. Co.*, 211 Mass. 409; *State Bk. v. McCabe*, 135 Mich. 479; *Globe Sav. Bk. v. National Bk.*, 64 Neb. 413; *Jeffray v. Towar*, 63 N. J. Eq. 530; *United States etc. Co. v. Adoue*, 104 Tex. 379; *Hale v. Windsor Sav. Bk.*, 90 Vt. 487.

If a trustee or other fiduciary in breach of trust makes a deposit of trust money in a trust account, the bank does not become a trustee if it has no reason to know that the deposit is in breach of trust. *Officer v. Officer*, 120 Iowa 389; *Kendall v. Fidelity T. Co.*, 230 Mass. 238; *Paul v. Draper*, 158 Mo. 197. See *City of Sturgis v. Meade County Bk.*, 38 S. D. 317, *ante*, p. 24.

If however the bank knows that it is a breach of trust to make the deposit, it is liable as a constructive trustee. *Board of Commissioners v. Strawn*, 157 Fed. 49; *City of Lincoln v. Morrison*, 64 Neb. 822.

By the weight of authority it is held that a bank is not liable merely because it knowingly allows a trustee to place trust funds to his private account and subsequently to withdraw the funds. *Coleman v. Bucks etc. Bk.*, [1897] 2 Ch. 243; *Shields v. Bank of Ireland*, [1901] 1 I. R. 222; *Batchelder v. Central Nat. Bk.*, 188 Mass. 25; *Allen v. Fourth Nat. Bk.*, 224 Mass. 239 (though

depositor had both private and trust accounts with the bank); *Havana C. R. R. Co. v. Knickerbocker T. Co.*, 198 N. Y. 422 (like preceding case); *Safe Dep. & T. Co. v. Bank*, 194 Pa. 334; *Hood v. Kensington Nat. Bk.*, 230 Pa. 508; *United States F. & G. Co. v. Home Bank*, 77 W. Va. 665. But see *Duckett v. Mechanics' Bk.*, 86 Md. 400 (where the bank in violation of instructions placed the funds to the credit of the trustee individually); *American Bonding Co. v. Mechanics Bk.*, 97 Md. 598; *Bank of Hickory v. McPherson*, 102 Miss. 852; *United States F. & G. Co. v. People's Bk.*, 127 Tenn. 720 (depositor had both private and trust accounts with the bank).

On the question whether a bank is liable if it allows a trustee or other fiduciary to withdraw trust funds when it knows or suspects that he intends to use the funds in breach of trust, see *National Bk. v. Insurance Co.*, 104 U. S. 54; *Gray v. Johnston*, L. R. 3 H. L. 1; *Havana C. R. R. Co. v. Central T. Co.*, 204 Fed. 546; *Nehawka Bank v. Ingersoll*, 2 Neb. Unof. 617.

. On the general question of the liability of a bank which has received the trust funds on deposit, see *Perry, Trusts*, sec. 122n.; 2 *Daniel, Neg. Inst.*, 6 ed., sec. 1612a; 1 *Morse, Banks and Banking*, 5 ed., sec. 317; *Ann. Cas.* 1914B 677; L. R. A. 1915C 518; 7 *Corp. Jur.* 644; 6 *Calif. L. Rev.* 171; 11 *Col. L. Rev.* 428; 13 *Col. L. Rev.* 727; 27 *Harv. L. Rev.* 176.

CHAPTER VIII.

LIABILITIES OF THE TRUSTEE TO THIRD PERSONS.

TRINITY COLLEGE IN CAMBRIDGE *v.* BROWNE.

CHANCERY. 1686.

1 Vern. 441.

THE bill was to discover the best beast of *cestui que trust* of a college lease: the defendant demurred, for that the best beast of the *cestui que trust* could not be taken for a heriot: and it also appeared of the plaintiff's own showing that the tenants, who had the estate in law in them, were yet living.

*The demurrer was allowed.*¹

LEWIS *v.* SWITZ.

UNITED STATES CIRCUIT COURT, DISTRICT
OF NEBRASKA. 1896.

74 Fed. 381.

SHIRAS, District Judge. The plaintiff herein, as receiver of the Buffalo National Bank, seeks to recover judgment against the defendant for the amount of an assessment, levied by the comptroller of the currency, upon the shares of stock held in said bank; it being averred in the petition that the defendant is the owner of 50 shares of the capital stock of the bank, of the par value of \$100 per share. The defendant, answering said petition, avers, in substance, that he is not in fact the owner of any shares in said bank; that one Hamer was formerly the owner of the shares; that he had become indebted to the bank; that

¹ So the trustee, and not the *cestui que trust* of a copyhold, must pay the fine on admission. *Earl of Bath v. Abney*, 1 Dick. 260, 1 Burr. 206, s. c.; *Londesborough v. Foster*, 3 B. & S. 805; *Hall v. Bromley*, 35 Ch. Div. 642, 655, per Lindley, L. J.: "Admittance and the right to admittance depend upon the legal estate, and the lord can look at that only, and has nothing to do with any equitable devolution of title." — AMES.

the president of the bank came to defendant, and stated that the only chance the bank had to protect itself from loss by reason of the debt due the bank from Hamer was to purchase the shares of stock and give him credit on the purchase price for the indebtedness due the bank; that he, on behalf of the bank, desired the defendant to take the shares of stock in trust for the bank, and for its benefit; that defendant agreed to act as trustee in the manner stated, and in pursuance of this arrangement Hamer surrendered the shares held by him, and new certificates therefor were issued in the name of the defendant; that by a written agreement to that effect he (the defendant) holds the shares in fact as a trustee for the bank, and not in his own right, nor for his own benefit. To this answer plaintiff demurs, on the ground that the facts set forth in the answer do not constitute a defense to the action.

The demurrer to the answer admits the fact to be that the defendant is not the actual owner of the shares of stock standing in his name, but that he holds the same as a trustee for the bank. Section 5152 of the Revised Statutes expressly enacts that "persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liabilities as stockholders [but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust-funds would be, if living and competent to act and hold the stock in his own name.]" If, therefore, when the new certificates of stock were issued to the defendant, it had been made to appear upon the books of the bank that the defendant took the same, not in his own right, but as a trustee, he could not be held personally liable thereon. The averments of the answer show, however, that the character in which the defendant took the stock was not made to appear upon the bank records; but, on the contrary, the certificates were issued to him in his own name, and upon the books of the bank he was carried as the owner, in fact, of the stock. The general rule is well settled that, if a person knowingly permits his name to be entered upon the stock books of a national bank as the owner of stock therein, he cannot be permitted, as against creditors, to show that, in fact, he was not the owner. *Thomp. Corp.* §§ 3192-3194; *Welles v. Larabee*, 36 Fed. 866; *Finn v. Brown*, 142 U. S. 56, 12 Sup. Ct. 136. The averments in the answer filed in this case show that the defendant consented to the transfer of the shares of stock to

himself. He knew that the new certificates were issued in his own name, and he did not cause the books to show that he held the stock, not in his own right, but as a trustee only. Under these circumstances he is liable to creditors, represented by the receiver, for the assessment levied on the stock.

*Demurrer sustained.*¹

MAGUIRE v. TAX COMMISSIONER.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1918.

230 Mass. 503.

RUGG, C. J. The petitioner, a resident of Cambridge in this Commonwealth, prays in accordance with St. 1916, c. 269, § 20, for the abatement of a tax alleged to have been assessed illegally. The tax was levied upon income received during 1916 from a trust established by the will of a deceased resident of Pennsylvania. That trust now is and always has been administered at Philadelphia in that State by the Girard Trust Company, a Pennsylvania corporation having no place of business in Massachusetts, under appointment by a court of competent jurisdiction in that State. The trust fund consists of mortgages, stocks and bonds. All the securities, documents and other evidences of title of the property belonging to the trust at all times since its creation have been kept physically in the exclusive custody of the trustee in Philadelphia. Some of these securities were taxable and taxed to the trustee in Pennsylvania. The rest were not so taxed or taxable under the laws of Pennsylvania. Of these latter there were bonds of three corporations exempted from direct taxation to the trustee because the debtor corporations under a Pennsylvania statute paid to that State a tax for and in behalf of the owners of the bonds. Certificates of the Southern Railway Equipment Trust were exempt from such taxation because all payments under them were rental for the use of tangible personal property, which in fact had a *situs* outside of Massachusetts, and shares of stock in two corporations were exempt from such taxation because the corporations paid to the State a tax on their capital stock.

¹ See Mitchell's Case, L. R. 9 Eq. 363; *Re Moseley Green etc. Co.*, 4 DeG. J. & S. 416; *Muir v. City of Glasgow Bk.*, 4 App. Cas. 337; *Sherwood v. Illinois Tr. & Sav. Bk.*, 195 Ill. 112; *Converse v. Paret*, 228 Pa. 156. See Ames, 279n.; 1 Cook, Corporations, 7 ed., secs. 245, 246; 1 Machen, Corporations, sec. 767; 30 L. R. A. (N. S.) 1092.

The income received by the petitioner from the securities taxed to the trustee in Pennsylvania is not subject to taxation under our income tax law. . . .

The effect of § 11 of the income tax law in connection with the final sentence of § 23, cl. 5 of the general tax law, both already quoted, is that property held in trust in a sister State by a trustee there taxed therefor, is expressly exempt from taxation to the *cestui que trust* here resident. These lucid words are precisely applicable to circumstances like those here disclosed. There is no reason why these words should not be given their natural effect. A reason for this exemption under the existing income tax law is not far to seek. In the ordinary case of direct individual ownership of intangible securities there is no taxation except at the domicile of the owner, because in most instances taxation of that kind of property is based on the maxim *mobilia sequuntur personam*. There are some exceptions even to this rule. For instance, debts for purposes of taxation may under appropriate conditions have a *situs* at the residence of the debtor as well as of the creditor. *Liverpool & London & Globe Ins. Co. v. Orleans Assessors*, 221 U. S. 346, 354. So also may shares of stock in corporations by express statute have a taxable *situs* at the domicile of the corporation as well as at the residence of the shareholder. *Corry v. Mayor & Council of Baltimore*, 196 U. S. 466. *Bellows Falls Power Co. v. Commonwealth*, 222 Mass. 51. But the general rule still obtains that intangibles have a taxation *situs*, and in practice usually their only taxation *situs*, at the residence of the owner. *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54. This being so, the imposition of an income tax such as is levied by our income tax law is based on the theory that the income tax is the only tax which in justice ought to be imposed in respect of such ownership, especially because in general the property represented by such intangibles contributes to the support of government in some other form. See *Hawley v. Malden*, 232 U. S. 1, 13 and *Simplex Electric Heating Co. v. Commonwealth*, 227 Mass. 225.

But the ownership of property held in trust in a sense is divided. The legal title is in the trustee, but the entire beneficial interest is in the *cestui que trust*. In such cases it is quite possible that the property may be taxed to the trustee as the legal owner in the State of his residence, regardless of the residence of the *cestuis que trust*. That has been our own law. *Welch v. Boston*, 221 Mass. 155. *Crocker v. Malden*, 229 Mass.

313. It doubtless was felt to be inequitable in such instances to compel the *cestui que trust* to pay another tax to this Commonwealth. Although our statute is now changed in this respect by § 9 of the income tax law, so that this Commonwealth no longer taxes the resident trustee for intangible personal property held for the benefit of non-residents, yet the reason for the exemption from taxation of the resident *cestui que trust* whose trustee, resident in another State, has there paid a lawful tax in respect of the trust property, still remains in principle. It is only in degree that its importance is diminished by the change in the scheme and rate of taxation. . . .

The validity of the portion of the tax, assessed upon income from securities not taxable and not taxed to the trustees under the laws of Pennsylvania, must be considered next. It is not contended that income from this source is not taxable according to the terms of our income tax law. The position of the petitioner upon this branch of the case is that in this respect the income tax law is unconstitutional in that it operates to take her property without due process of law, and in other respects violates her fundamental rights.

It is plain that if the intangible property, legal title to which is held by the trustee in Pennsylvania, were owned in absolute ownership by the *cestui que trust* resident here it legally would be taxable to her here. That is settled so far as concerns the Constitution of this Commonwealth, by *Hawley v. Malden*, 204 Mass. 138, and the many cases there collected, and so far as the Federal Constitution is concerned, by the same case on writ of error in 232 U. S. 1. The question, whether the nature of the right of a *cestui que trust* in a trust held in a sister State is such as to be subject to taxation here, was before this court in *Hunt v. Perry*, 165 Mass. 287. In that case the beneficiary of a trust fund, created under the will of a deceased resident of Maine, held in that State by trustees there resident and appointed by its courts, was taxed as a resident of this Commonwealth for her interest in the trust. It was said by Allen, J., speaking for the court (p. 291): "The statute under consideration rests on the ground that the *cestuis que trust* residing here have a beneficial interest in the trust fund which is valuable, and that they are in effect the equitable owners thereof. An interest of this kind is property, which the Legislature may subject to taxation. *Bates v. Boston*, 5 Cush. 93. *Williston Seminary v. County Commissioners*, 147 Mass. 427. *Hathaway v. Fish*,

13 Allen, 267. . . . The defendants contend that the statute, if such is its true construction, is unconstitutional. . . . This argument, however, is met by the suggestions already made, that the *cestui que trust* is here, and his ownership or title is here, namely, the right to the income of the trust fund. The fact that the corpus of the trust fund is held by trustees who live elsewhere, and who hold under a will proved and allowed elsewhere, does not take away the power of the Legislature to subject the interest of the *cestuis que trust* to taxation here, if they live here." Other expressions are used in the course of that opinion, some of which cannot stand in the light of decisions of the United States Supreme Court in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, *Delaware, Lackawanna & Western Railroad v. Pennsylvania*, 198 U. S. 341, *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385, all rendered since *Hunt v. Perry*. But it does not seem to us that the soundness of the ground of that decision stated in the words quoted has been shaken by subsequent decisions. The exception to the general principle that personal property is taxable at the domicile of the owner seems to be rather strictly confined to chattels, live stock and other property which possesses a visible corporeal existence and which have acquired a manifest and permanent *situs* in another State. *Southern Pacific Co. v. Kentucky*, 222 U. S. 63. These decisions of the United States Supreme Court relied on by the petitioner do not appear to us to have wrought such ruin with the long established practice as to taxation in this Commonwealth as she contends. Indeed the soundness of the reasoning of the opinion in *Hunt v. Perry*, 165 Mass. 287, already quoted, appears to us to be sustained in principle by the most recent pronouncement of that court upon the subject in *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54. . . . It is of no consequence in this aspect whether the tax is levied on income in truth received by the resident taxpayer from intangible property held for his benefit by a trustee resident in a sister State or on intangible property owned by the taxpayer but all in fact kept by him in a sister State. There is not apparent to us any difference in principle between the two cases. . . .

The trustee in Pennsylvania holds simply the legal title. He is possessed of the property in question solely for the benefit of the *cestui que trust*. The latter "is the real, substantial and beneficial owner of an estate which is held in trust as distin-

guished from the trustee in whom the mere legal title is vested." Larkin v. Wikoff, 5 Buch. 462, 474, affirmed on this point in 7 Buch. 589. The *cestui que trust* has important legal rights respecting the trust fund which are personal to her. They are rights in the nature of property. They cannot be taken away from her by arbitrary or irrational procedure. They attach to her person wherever she goes. One of these is the right to receive the income. That is a property right. The income when received is property. The tax here in question is a property tax. Tax Commissioner v. Putnam, 227 Mass. 522, 531, 532. Whether it be regarded as a tax on the right of the *cestui que trust* or a tax on the income as received, in either event a property tax is permissible. Of necessity a tax on income requires time as an element in its calculation. It must be levied on the income received during a period of time. It is not necessary that income be reinvested before it can be taxed. It may be spent as received and yet be subject to taxation. The contention of the petitioner in principle reaches much further than to the facts of the present case. In its logical application and extension it apparently would render invalid income from annuities, certificates in partnerships, associations and trusts and perhaps other sources, originating in sister States, and not having a place of business in this Commonwealth. Of course, if the principle is sound, its disturbing effect is no argument against its recognition and adoption. But a contention which in its results would seriously cripple the practical operation of any comprehensive system of State income taxation has no presumption in its favor and ought not to be adopted except because of compelling considerations. We perceive no such requirement as to the tax here in controversy. Whatever may be the effect of Pollock v. Farmers' Loan & Trust Co. 157 U. S. 429, 581; S. C. 158 U. S. 601, and Brushaber v. Union Pacific Railroad, 240 U. S. 1, 16, 17, upon the nature of the tax here in question under the Constitution of the United States, no binding decision appears to us to require that this tax be declared invalid. There is nothing inconsistent with the conclusion here reached in Walker v. Treasurer & Receiver General, 221 Mass. 600.

The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon

the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference. It is true of the present tax, as was said by Chief Justice Shaw in *Bates v. Boston*, 5 Cush. 93 at page 99, "The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call him, nor hold him, to any accountability. It affects only the income, after it has been paid by the trustee" to the beneficiary.

Our income tax law is founded upon interstate comity in this regard. It taxes only residents of this Commonwealth in respect of property in which they have a beneficial interest. It exempts resident trustees, although manifestly within the legal scope of its power, from taxation upon funds for the benefit of non-resident *cestuis que trust*. But it taxes resident *cestuis que trust* in respect of income actually received by them from trust property held in other States and not there taxed. This principle of taxation, just in itself and based upon recognition of like rights in sister States and manifestly aimed at the elimination of duplicate taxation upon the same property in different States, does not seem to us to violate any guaranty of the Fourteenth Amendment to the Federal Constitution.

No distinction in principle is manifest to us touching the income derived from the several classes of intangible securities held by the trustee and not taxed in Pennsylvania. See, in this connection, *Hawley v. Malden*, 232 U. S. 1, 13, and *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 58.

An abatement of the tax as assessed is granted in accordance with the terms of the statute in the sum of \$16.86. *So ordered.*¹

¹ Under statutes imposing upon the owner of land a personal liability for taxes, a trustee is liable. *Latrobe v. Mayor etc. of Baltimore*, 19 Md. 13; *Ames*, 279; *Ann. Cas.* 1917D 946. Similar statutes as to assessments also are generally so construed. *City of Bangor v. Pierce*, 106 Me. 527. *Cf. Dana v. Treasurer*, 227 Mass. 562, and *Priestly v. Treasurer*, 230 Mass. 452, as to inheritance taxes.

DANTZLER v. MCINNIS.

SUPREME COURT, ALABAMA. 1907.

151 Ala. 293.

McCLELLAN, J. The action is *assumpsit* against appellants by appellee as surviving partner of the late firm of McInnis & Dantzler. Stating the matter with perhaps undeserved favor to appellee, the asserted right to recover arises out of the fact that the appellee's firm, throughout many years, advanced to Susan A. Loper, who was the trustee of or for appellants of certain real estate in Mobile, and charging the same to her individually on their books of account, various sums of money which was sued for and did pay the taxes due on such real estate. It is the positive duty of a trustee to pay the taxes accruing against the *corpus* of the trust estate; and, if without funds of the estate in his hands, he may advance the necessary funds out of his own to pay the taxes, which, when done by him, becomes a charge on the property. — 2 Beach on Trusts, § 510. The rule is settled in this state that a stranger who makes advancements, or extends credit, or renders services, or furnishes necessities to trustees, though made in execution of the trust, or to enable them to perform their legal duties under the trust, creates only a personal liability against the trustees. The creditors "can look to them (trustees) only for payment and they (trustees) must look for reimbursement, after making the payment, to the trust estate." — *Mosely v. Norman*, 74 Ala. 422; *Sanford v. Howard*, 29 Ala. 684, 68 Am. Dec. 101; *Askew v. Myrick*, 54 Ala. 30; *Jones v. Wawson*, 19 Ala. 672, and authorities therein cited; *Taylor v. Crook*, 136 Ala. 375, 34 South. 905, 96 Am. St. Rep. 26. And it is further settled that (unless otherwise provided by section 4183 *et seq.* of the Code of 1896, which is unnecessary to be considered) the trust estate can be made liable in equity by subrogation to the trustee's rights only where the trustee is insolvent, as established by the exhaustion of all legal remedies, and on settlement of his administration the estate is indebted to him, and only then when the advancement or property made or furnished by the creditor has inured to the benefit of the trust estate or to the *cestui que trust*. — *Mosely v. Norman*, *supra*; *Askew v. Myrick*, *supra*; and other authorities *supra*. It results from the principle above announced that the *cestui que trust* is not liable

directly, even though he and his estate were beneficiaries of the creditor's funds or property. . . .

There being, then, no liability of appellants enforceable against them in this action, the general affirmative charge requested by them should have been given. The judgment will be reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and DOWDELL and ANDERSON, JJ., concur.¹

¹ Taylor v. Davis' Adm'r, 110 U. S. 330 (*semble*); Everett v. Drew, 129 Mass. 150 (*cestui que trust* not undisclosed principal); Truesdale v. Philadelphia etc. Ins. Co., 63 Minn. 49; Wells-Stone Mercantile Co. v. Grover, 7 N. D. 460; Manhattan Oil Co. v. Gill, 118 N. Y. App. Div. 17; Hartley v. Phillips, 198 Pa. 9; Gates v. Avery, 112 Wis. 271, *accord*.

The trustee is personally liable on contracts made by him for the benefit of the trust estate. Bradner Smith & Co. v. Williams, 178 Ill. 420; Blewitt v. Olin, 14 Daly (N. Y.) 351; Mitchell v. Whitlock, 121 N. C. 166; Fehlinger v. Wood, 134 Pa. 517; Connally v. Lyons & Co., 82 Tex. 664. See 40 L. R. A. (N. S.) 201. See also note to Philip Carey Co. v. Pingree, 223 Mass. 352, *post*. As to the liability of executors and administrators, see Williams, Executors, 10 ed., pp. 1417 *et seq.*; Woerner, American Law of Administration, 2 ed., secs. 328, 356.

The creditor cannot, after obtaining a judgment against the trustee personally, thereupon levy on the trust estate. Jennings v. Mather, [1902] 1 K. B. 1; Zehnbar v. Spillman, 25 Fla. 591; Hussey v. Arnold, 185 Mass. 202; Feldman v. Preston, 194 Mich. 352; Moore v. Stemmons, 119 Mo. App. 162; O'Brien v. Jackson, 167 N. Y. 31. See Church v. Ferril, 48 Ga. 365.

Nor can the creditor reach the trust estate by bringing an action at law or in equity against the trustee "as trustee." Hampton v. Foster, 127 Fed. 468; Odd Fellows Hall Ass'n v. McAllister, 153 Mass. 292; United States T. Co. v. Stanton, 139 N. Y. 531; O'Brien v. Jackson, 167 N. Y. 31; Mulrein v. Smillie, 25 N. Y. App. Div. 135; Jessup v. Smith, 170 N. Y. App. Div. 605. But see Ala. Code, 1907, secs. 6085-7; Conn. Gen. Stat., 1918, sec. 5771; Ga. Code, 1911, secs. 3786-90. The rule is the same in the case of contracts made by executors. Farhall v. Farhall, L. R. 7 Ch. 123; Taylor v. Crook, 136 Ala. 354; Austin v. Munro, 47 N. Y. 360; Le Baron v. Barker, 143 N. Y. App. Div. 492; Decillis v. Mascelli, 152 N. Y. App. Div. 304.

The Trustee's Right of Reimbursement and Exoneration. The trustee has a right to reimbursement out of the income or *corpus* of the trust estate (enforceable in equity but not at law, Sayles v. Blane, 14 Q. B. 205) when he has discharged liabilities properly incurred by him in administering the trust; and he has a lien on the income and *corpus* of the trust estate to secure his right to reimbursement. Williams v. Allen, 32 Beav. 650; *Re Exhall Coal Co.*, 35 Beav. 449; Dodds v. Tuke, 25 Ch. D. 617; Stott v. Milne, 25 Ch. D. 710; Governors v. Richardson, [1910] 1 K. B. 271; Woodard v. Wright, 82 Cal. 202; Perrine v. Newell, 49 N. J. Eq. 57; Turton v. Grant, 86 N. J. Eq. 191; Livingston v. Newkirk, 3 Johns. Ch. (N. Y.) 312; Matter of Ungrich, 201 N. Y. 415. Lewin, Trusts, 795; Pomeroy, Eq. Juris., sec. 1085.

The trustee who has incurred but not yet discharged a liability in the

MASON v. POMEROY.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1890.

151 Mass. 164.

C. ALLEN, J. The late Theodore Pomeroy devised his mills and manufacturing property to three trustees, in trust, to continue and carry on his manufacturing business until his son,

administration of the trust, has a right to exoneration from the trust estate. *Re National Financial Co.*, L. R. 3 Ch. 791; *Hobbs v. Wayet*, 36 Ch. D. 256. See also *Re Richardson*, [1911] 2 K. B. 705; *Buchan v. Ayre*, [1915] 2 Ch. 474. In *Re Blundell*, 40 Ch. D. 370, Stirling, J., said: "What is the right of indemnity? I apprehend that in equity, at all events, it is not a right of the trustee to be indemnified only after he has made necessary payments . . . but that he is entitled to be indemnified, not merely against the payments actually made, but against his liability. . . . It seems to me, therefore, that a trustee has a right to resort in the first instance to the trust estate to enable him to make the necessary payments to the persons whom he employs to assist him in the administration of the trust estate; that he is not bound in the first instance to pay those persons out of his own pocket, and then recoup himself out of the trust estate, but that he can properly in the first instance resort to the trust estate, and pay those persons whom he has properly employed the proper remuneration out of the trust estate."

Where the creator of the trust is also the *cestui que trust*, the trustee has a right to reimbursement or exoneration from the *cestui que trust* personally. *Balsh v. Hyham*, 2 P. Wms. 453; *Phene v. Gillan*, 5 Hare 1; *Ex parte Chippendale*, 4 DeG. M. & G. 19; *Cruse v. Paine*, L. R. 6 Eq. 641; L. R. 4 Ch. 441; *Lacey v. Hill*, L. R. 18 Eq. 182. See *Fraser v. Murdock*, 6 App. Cas. 855. He has this right although the *cestui que trust* is not the creator of the trust. *Hardoon v. Belilios*, [1901] A. C. 118. In this case Lord Lindley said (p. 123): "The plainest principles of justice require that the *cestui que trust* who gets all the benefit of the property should bear its burdens unless he can shew some good reason why his trustee should bear them himself."

If there are several *cestuis que trust* they may be held *pro rata*. *Matthews v. Ruggles-Brise*, [1911] 1 Ch. 194.

A *cestui que trust* who disclaims or who is not *sui juris* is not personally liable to reimburse the trustee. *Hardoon v. Belilios*, [1901] A. C. 118, 123 (*semble*).

It has been held that the trustees of an unincorporated club have no right to reimbursement from the members of the club. *Wise v. Perpetual Trustee Co., Ltd.*, [1903] A. C. 139. See *Williams, Club Trustees' Right to Indemnity*, 19 L. Quar. Rev. 386. See also 3 Col. L. Rev. 407; 17 Harv. L. Rev. 141; 29 *ibid.* 420. Cf. *Stikeman v. Flack*, 175 N. Y. 512, reversing s. c., 58 N. Y. App. Div. 277. The trustees are entitled to reimbursement from the club property. *Minnitt v. Lord Talbot*, L. R. Ir. 1 Ch. 143. As to the liability of the trustees of a club, see *Brown v. Lewis*, 12 T. L. R. 455; *Samuel Brothers v. Whetherly*, [1908] 1 K. B. 184; *Nat. Bank of Scotland v. Shaw*, [1913] S. C. 133.

Theodore L. Pomeroy, should arrive at the age of twenty-one years. They were to provide for the outstanding and current liabilities, and to incur on account of said trust estate, during the continuance of the trust, such further liabilities as a wise and prudent management might require, and when his said son should become twenty-one years of age to convey the property to the testator's two sons, Silas H. and Theodore L., or in case either one of them should decline to continue in business with the other, then to convey the same to the other upon his paying certain sums to the son who should withdraw; with certain other provisions relating to the termination of the trust not necessary to be recited here. The will further provided, that the trustees should be entitled to a fair and reasonable compensation, and that they should not be liable for any loss to the trust estate which did not involve bad faith on their part, and that at the termination of the trust, and before any transfer or conveyance, they should be fully indemnified against any then existing personal liability incurred in the proper execution of the trust.

The three trustees accepted the trust, and carried on the business together till May, 1885, when, in consequence of disagreements which had arisen among them, it was arranged that thenceforth the business should be carried on by Silas H. Pomeroy, one of the trustees; and this was done under the circumstances which are detailed in the master's report. The son, Theodore L., became twenty-one years of age on November 13, 1887, and the time had thus come for the termination of the trust. A large amount of indebtedness was then existing, some of which was incurred by the three trustees while carrying on the business together, and some by Silas H. Pomeroy while carrying on the business alone. A partnership firm belonging to the latter class of creditors brought the present suit in behalf of themselves and of other similar creditors, averring that the trustees refused to pay their said debts, and that neither of them had property open to attachment or execution, and seeking to establish and enforce an equitable right to have their claims paid out of the trust property, and especially to have enforced in their favor the right of the trustees for reimbursement and indemnity out of the trust fund before its distribution.

The principal questions in the case are raised by the two trustees, Atwater and Turnbull, who withdrew from the active management of the business in 1885, and they contend that the

creditors whose debts accrued under the joint management are entitled to a priority over the later creditors,¹ and, indeed, that the present bill cannot be maintained at all by the latter. In support of their demurrer, they rely upon the following propositions: 1. That the plaintiffs have no equity, because they do not offer in the bill to make good to the trust fund the losses and defaults occasioned by the acts of the trustee Silas H. Pomeroy, with whom they contracted, and that their right to the trust fund must be limited by his right to indemnity from that fund. 2. That the plaintiffs' sole remedy is at law. 3. That there has been no previous recovery of judgment by the plaintiffs. 4. That there is no community of interest between the plaintiffs, and that one creditor cannot sue in behalf of all.

The most of these objections are answered by a brief consideration of the nature of the bill. It is in its essential character a bill seeking to enforce the proper execution of a trust, which is ready to be terminated, and in which nothing remains to be done but to transfer the trust property in accordance with the equitable rights of the various parties who assert conflicting claims thereto. It is, indeed, difficult to see how this object can be accomplished in any other way than by a suit in equity. The plaintiffs claim equitable rights in the premises. Their position as creditors entitles them to assert such rights, and to seek the determination of the court whether, on the particular facts of the case, their rights should be sustained. That is to say, where trustees who are authorized to carry on a business contract debts, they are not only liable personally for the payment of them, but the creditors may also resort to the trust fund, subject, however, to the rules of equity, as applicable to the facts and circumstances which may exist in any particular case. *Ex parte* Garland, 10 Ves. 110. *Ex parte* Richardson, 3 Madd. 138. *Owen v. Delamere*, L. R. 15 Eq. 134. *Cutbush v. Cutbush*, 1 Beav. 184. *Thompson v. Andrews*, 1 Myl. & K. 116. *Burwell v. Mandeville*, 2 How. 560. *Smith v. Ayer*, 101 U. S. 320, 330. *Jones v. Walker*, 103 U. S. 444. *Pitkin v. Pitkin*, 7 Conn. 307. *Lewin on Trusts*, (7th ed.) 217. It is indeed contended on the part of the plaintiffs, that their right to resort to the trust property is a primary and original right, which exists independently of any right on the part of the trustee to be indemnified. *Wylly v. Collins*, 9 Ga. 223. The view,

¹ A part of the opinion in which the court held that the earlier creditors had no right to priority over the later creditors, is omitted.

however, which has prevailed in England, so far as the question has been discussed, is that the creditors may reach the trust property when the trustees are entitled to be indemnified therefrom, and that the creditors reach it by being substituted for the trustees, and standing in their place. *In re Johnson*, 15 Ch. D. 548. *Dowse v. Gorton*, 40 Ch. D. 536. It is with reference to this doctrine that the defendants contend that the plaintiffs ought to offer in their bill to make good to the trust fund the losses and defaults occasioned by the acts of Silas H. Pomeroy. But this ground is untenable on the demurrer, because, assuming for the present this doctrine to be correct, and taking the plaintiffs' case upon the lowest ground, the bill sets out the right of the trustees to be indemnified against personal liability incurred in the proper execution of the trust, the existence of such liability to the plaintiffs and others, and the equitable right of the plaintiffs and others to have enforced in their favor for the payment of their claims the rights of the trustees for reimbursement and indemnity; and it asserts a right to have their claims paid out of the trust property and estate in full, or, if such property and estate are insufficient, then to have their claims paid in *pro rata* proportions; and prays that the trustees be held and ordered to account for the trust property, and that an account of the creditors may also be taken, and the equitable interest of Silas H. Pomeroy in trust the estate may be sold and disposed of, and the proceeds applied in payment of the plaintiffs and others. There is no occasion for any distinct offer on the part of the plaintiffs to make good any possible losses to the trust estate arising from his misconduct, if any such there were, since they would only succeed to such rights as he might be found to have. There is no suggestion in the bill of any misconduct or default on his part; but if there were, and if the plaintiffs have no higher right than simply to stand in his place, the bill need not contain any such offer to make good losses in order to entitle the plaintiffs to reach whatever upon an account may be found to remain as a fund from which he would be entitled to be indemnified. The result of such an accounting cannot be anticipated on a demurrer. If it should prove finally that there was nothing to which he was entitled, then the plaintiffs would fail on the merits, unless they should succeed in maintaining their case upon some ground independent of being substituted to the equity of the trustee who contracted the debt to them.

It is not necessary that the plaintiffs who institute such a suit should first have recovered judgment on their claims, or even that their claim should be yet due. *Whitmore v. Oxborrow*, 2 Yo. & Col. Ch. 13. 1 Story, Eq. Jur. § 547. And the usual way is for one creditor to sue in behalf of all. Story, Eq. Pl. § 99. *Egberts v. Wood*, 3 Paige, 517, 520. *Hallett v. Hallett*, 2 Paige, 15. *Chapman v. Banker & Tradesman Publishing Co.* 128 Mass. 478. *Thompson v. Dunn*, L. R. 5 Ch. 573.

We can have no doubt, therefore, that the demurrer to the bill should be overruled. . . .

There has been no accounting in which Pomeroy has been found to be in default, as in the case of *In re Johnson*, before cited; and there is nowhere in the master's report any finding that there has been any loss to the trust estate through any fault of his; much less, that there has been any loss which involved bad faith on his part. We are therefore unable to see that he is in any manner indebted to the trust estate, or that there is any equity existing against him to prevent him from being indemnified out of the trust estate for personal liabilities assumed by him in the conduct of the business.

Nor do we see any good reason for giving to the first class of creditors, whose debts accrued while the three trustees were carrying on the business, a priority over the later creditors, whose debts accrued during the management of Pomeroy. . . .

*Decree accordingly.*¹

¹ *Fairland v. Percy*, L. R. 3 P. & D. 217; *Re Pumfrey*, 22 Ch. D. 255; *Moore v. M'Glynn*, [1904] 1 I. R. 334; *King v. Stowell*, 211 Mass. 246; *Laible v. Ferry*, 32 N. J. Eq. 791; *Paul v. Wilson*, 79 N. J. Eq. 204; *Wells-Stone Mercantile Co. v. Aultman, Miller & Co.*, 9 N. D. 520; *Ranzau v. Davis*, 85 Ore. 26; *Cater v. Eveleigh*, 4 Desaus. Eq. (S. C.) 19; *Braun v. Braun*, 14 Manitoba 346, *accord*.

In *Strickland v. Symons*, 26 Ch. D. 245, the court held that the creditor could not reach the trust estate unless the object of the trust was the carrying on of a business. But this seems inconsistent with *Re Richardson*, [1911] 2 K. B. 705. And see *Re Pumfrey*, 22 Ch. D. 255; *O'Neill v. McGrorty*, [1915] 1 I. R. 1.

Since the trustee has a right against the *cestui que trust* personally for exoneration (*Hardoon v. Belilios*, [1901] A. C. 118), it would seem that the creditor may reach this right by equitable execution. In *Poland v. Beal*, 192 Mass. 559, the *cestuis que trust* expressly promised the trustee to furnish money to pay for certain property which they requested him to purchase for the benefit of the trust estate. It was held that the vendor could maintain a bill in equity against the *cestuis que trust*. See Williston, *Contracts for the Benefit of a Third Person*, 15 Harv. L. Rev. 767, 775.

In most jurisdictions the creditor cannot avail himself of the trustee's

right to exoneration if the trustee is available and solvent. *Owen v. Delamere*, L. R. 15 Eq. 134; *Johnson v. Leman*, 131 Ill. 609; *Stern Bros. v. Hampton*, 73 Miss. 555. See also *Huselton & Co. v. Durie*, 77 N. J. Eq. 437; *Trotter v. Lisman*, 199 N. Y. 497. But in Massachusetts, where the exhausting of legal remedies is not a condition precedent to equitable execution (*Wilson v. Martin-Wilson etc. Co.*, 151 Mass. 515, 517), it is not necessary to show that the trustee is insolvent. See *King v. Stowell*, 211 Mass. 246.

If the trustee is outside the jurisdiction the creditor may reach the trust property. *Gates v. McClenahan*, 124 Iowa 593; *Norton v. Phelps*, 54 Miss. 467. See *Field v. Wilbur*, 49 Vt. 157.

The trustee may agree to forego in whole or in part the right to reimbursement or exoneration. *Gillan v. Morrison*, 1 DeG. & Sm. 421. See *Ex parte Chippendale*, 4 DeG. M. & G. 19, 52. His right may be limited to particular parts of the trust property. *Ex parte Garland*, 10 Ves. 110; *Burwell v. Mandeville's Ex'r*, 2 How. (U. S.) 560; *Smith v. Ayer*, 101 U. S. 320; *Fridenberg v. Wilson*, 20 Fla. 359; *Wilson v. Fridenberg*, 21 Fla. 386. Cf. *M'Neillie v. Acton*, 4 DeG. M. & G. 744; *Lucht v. Behrens*, 28 Oh. St. 231. Compare the following cases in which it was held not to be so limited: *Blodgett v. American Nat. Bk.*, 49 Conn. 8; *Moore v. McFall*, 263 Ill. 596; *Willis v. Sharp*, 113 N. Y. 586; *Davis v. Christian*, 15 Gratt. (Va.) 11. See *O'Neill v. McGrorty*, [1915] 1 I. R. 1, 15; *Laible v. Ferry*, 32 N. J. Eq. 791. Where the trustee's right of reimbursement or exoneration is limited to a part of the trust estate, the creditor can reach only that part of the estate. *Ex parte Richardson*, 3 Madd. 138; *Ex parte Garland*, 10 Ves. 110; *Cutbush v. Cutbush*, 1 Beav. 184; *Burwell v. Mandeville's Ex'r*, 2 How. (U. S.) 560; *Pitkin v. Pitkin*, 7 Conn. 307 (*semble*); *Wilson v. Fridenberg*, 21 Fla. 386; *Laible v. Ferry*, 32 N. J. Eq. 791; *Willis v. Sharp*, 113 N. Y. 586 (*semble*); *Lucht v. Behrens*, 28 Oh. St. 231.

If the trustee is in default, the creditor's right to reach the trust estate through the trustee is cut down or extinguished. *Re Johnson*, 15 Ch. D. 548; *Re Evans*, 34 Ch. D. 597; *Re British Power etc. Co.*, [1910] 2 Ch. 470; *Re Morris*, 23 L. R. Ir. 333; *Hewitt v. Phelps*, 105 U. S. 393; *Wilson v. Fridenberg*, 21 Fla. 386; *King v. Stowell*, 211 Mass. 246 (*semble*); *Clopton v. Gholson*, 53 Miss. 466; *Norton v. Phelps*, 54 Miss. 467 (*semble*); *Wells-Stone Mercantile Co. v. Aultman, Miller & Co.*, 9 N. D. 520 (*semble*).

But if there are two trustees and only one is in default, the creditor may reach the trust estate. *Re Frith*, [1902] 1 Ch. 342.

If the trustee pays the creditor, using, to the creditor's knowledge, funds of the trust estate, the creditor need not refund, although on an accounting the trustee is subsequently proved to be in default to the estate, unless at the time of making the payment the trustee was in default to the estate and the creditor knew that he was in default. *Re Blundell*, 40 Ch. D. 370, 44 Ch. D. 1.

In a few states the *cestui que trust* has a direct right against the trust property. *Askew v. Myrick*, 54 Ala. 30 (statutory, see Ala. Code, 1907, sec. 6085); *Wylly v. Collins & Co.*, 9 Ga. 223; *Miller v. Smyth*, 92 Ga. 154; *Sanders v. Houston etc. Co.*, 107 Ga. 49 (statutory, see Ga. Code, 1911, secs 3786-91); *Mathews v. Stephenson*, 6 Pa. 496; *Manderson's Appeal*, 113 Pa. 631; *Yerkes v. Richards*, 170 Pa. 346. And see Conn. Gen. Stat., 1918, sec. 5771. Cf. *Mannix v. Purcell*, 46 Oh. St. 102; *Field v. Wilbur*, 49 Vt. 157.

See Brandeis, *Liability of Trust-Estates on Contracts made for their Benefit*, 15 Amer. L. Rev. 449.

In a few states it is provided by statute that "A trustee is a general agent for the trust property. . . . His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal." Cal. Civ. Code, sec. 2267; Mont. Civ. Code, sec. 3020; N. D. Comp. Laws, 1913, sec. 6305; S. D. Civ. Code, sec. 1642.

If the trustee incurs an indebtedness in continuing the testator's business without authority to do so, the creditor cannot hold the trust estate. *Farmers & Traders' Bk. v. Fid. & Dep. Co.*, 108 Ky. 384; *Bauerle v. Long*, 187 Ill. 475; *Lucht v. Behrens*, 28 Oh. St. 231; *Tuttle v. First Nat. Bk.*, 187 Mass. 533; *Dunham v. Blood*, 207 Mass. 512; *Donnelly v. Alden*, 229 Mass. 109; *Laible v. Ferry*, 32 N. J. Eq. 791; *Welsh v. Davis*, 3 S. C. 110.

But if the estate was enriched the result is otherwise. *Thomas v. Provident Life & T. Co.*, 138 Fed. 348; *Deery v. Hamilton*, 41 Iowa 16; *Re Estate of Manning*, 134 Iowa 165; *De Concillio v. Brownrigg*, 51 N. J. Eq. 532; *Stillman v. Holmes*, 9 Oh. N. P. n. s. 198; *Field v. Wilbur*, 49 Vt. 157. But see *Hallock v. Smith*, 50 Conn. 127; *Laible v. Ferry*, 32 N. J. Eq. 791. For the Scotch law, see *Menzies, Trustees*, 2 ed., 227.

If the trustee pays the creditor with trust money, as the creditor knows, the creditor cannot keep the sum so paid if he knows that the trustee acted wrongfully in incurring the debt. *Farmers & Traders' Bk. v. Fid. & Dep. Co.*, 108 Ky. 384; *Hines v. Levers & Sargent Co.*, 226 Mass. 214.

In re RAYBOULD.

RAYBOULD v. TURNER.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1899.

[1900] 1 Ch. 199.

ADJOURNED SUMMONS.

This was an application for payment of a sum of 1092*l.* and costs out of the estate of the above-named testator, Thomas Raybould, which raised the question of the liability of a testator's estate for the tort of a trustee and executor.

The facts, so far as material for the purposes of this report, were as follows:—

Cornelius Chambers, the surviving trustee and executor of the above-named testator, in 1892 commenced working one of the testator's collieries, and in so doing he let down the surface of the land, and injured the buildings and machinery of an adjoining owner, Messrs. Roberts & Cooper.

In December, 1898, Messrs. Roberts & Cooper recovered judgment against the trustee, in an action in the Queen's Bench Division, for the amount found by a special referee for damages, together with the costs of the action. The special referee had assessed the damages at 1092*l.*, and Messrs. Roberts & Cooper

motion by way of appeal. The sum in dispute is 520*l*. The appellants, who are the governors of St. Thomas's Hospital, were freeholders entitled in reversion expectant on certain leases, and the lessee at the relevant time was Richardson, the husband. Richardson was a trustee for Mrs. Richardson, the wife. The leases came to an end in 1908, and there were then sums due for arrears of rent and for repairs enforceable under the covenants contained in the leases. Richardson, the husband, became bankrupt, and under an order of November 18, 1910, made in the bankruptcy, the governors of St. Thomas's Hospital obtained leave to use the name of the trustee in bankruptcy for the purpose of enforcing against the wife the sum which was due in respect of the rent and arrears, upon terms which included a term that if they should recover any sum from her, either in the name of the trustee or in their own names, they should apply to the Court in bankruptcy to determine whether the sum so recovered should be treated as assets divisible amongst creditors, or should be retained by them on account of the debt and costs due to them from the bankrupt. An action was brought in the joint names of the trustee and the governors of St. Thomas's Hospital against the husband and wife. It was discontinued against the husband and prosecuted against the wife and resulted in a compromise order under which the wife paid 520*l*. The question is how that 520*l*. ought to be disposed of. For brevity I am going to call the creditor (the governors of the hospital) A.; the lessee (the husband) who is entitled to be indemnified B.; and the person (the wife) who is liable to give the indemnity C. When B. became bankrupt in 1910, the right of action which B. had against C. was, I think, property which passed to the trustee in bankruptcy. The only way in which you could say it was not, as it seems to me, would be this: that it was a right of action enforceable by B. only for the benefit of A. If it were, it would be trust property and would not pass to the trustee. But that is not the right way to regard it. It is a right of action in B.'s trustee enforceable for the benefit of B. because it is a right of action whose use will relieve B. and B.'s estate from a debt which ought not to be borne by B., but ought to be borne by C. That is the first step. I think that the right of action vested in the trustee. Then what was it that vested in the trustee? It was a right to indemnity. Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be in-

demnified shall never be called upon to pay, and, according to my recollection, the judgments which have been pronounced in Courts of Equity upon rights of indemnity have assumed that form. The one that occurs to me is in *Cruse v. Paine*; L. R. 4 Ch. 441. There B. was the legal owner of shares: C. was the *cestui que trust* of the shares: C. had to indemnify B. The decree was this: "Declare that the defendants are bound to procure the release or discharge of the plaintiff's estate from the calls and let the defendants procure such release or discharge accordingly either by payment of the said calls or otherwise and indemnify his (the plaintiff's) estate against all such costs and charges as aforesaid." Let us work this out. If the sum which the trustee recovers in respect of the right of action (which, I agree, is vested in him) is to be applied for the benefit of the creditors generally, what is the result? Let us suppose that the trustee exercises his right of action and recovers judgment against C. for 520*l.*, and C. satisfies the judgment and B.'s trustee receives the 520*l.* Supposing then B.'s trustee having received the 520*l.* applies it with other money in payment of dividends to the creditors, say 10*s.* in the pound to all creditors of B., A. will receive 10*s.* in the pound like every one else. Subsequently further assets come in. A. of course is entitled to a further dividend, and he calls for a further dividend and receives it. B. can get nothing further from C. because C. has paid everything which he is bound to pay. The result therefore is that B. has not been indemnified. He has had the 520*l.*, but owing to the fact that the sum has not reached its proper destination, namely, the pocket of A., B. or his estate is still liable to A. and can make no further claim against C. Effect is therefore not given to an obligation to indemnify if the sum paid by C. is applied, not in discharge of the obligation due to A., but only partially to that and partially to some other purpose.

That ground seems to me sufficient to dispose of this case. This is an obligation to indemnify. How can effect be given to an obligation to indemnify? Only in one of three ways. If B. has paid the money to A., he may get it back from C. and may put it into his pocket. If B. has not paid the money to A., but calls on C. to pay the money to A., then if C. pays the money to A., B. is never out of pocket at all. In either of those cases B. is indemnified. But lastly, if B. has not paid the money to A. but calls upon C. to pay the money to him, B., in

order that he may pay it to A., then B. is not indemnified if the money is paid, not to A. alone, but to A. and others. According to the view put forward by the trustee in this case B. is not indemnified. The two propositions are perfectly consistent the one with the other, namely, (1.) that the right of action is property vested in the trustee and (2.) that it is a right of action which can only be enforced for giving effect to the contract of indemnity. In that way the estate does get the benefit of the right of action which is vested in the trustee. The trustee having recovered from C. pays A., and thus effect is given to the contract for indemnity. I am not aware of any authority directly in point on this case, but all the cases which have been referred to are perfectly consistent with this view, and in the Stock Exchange cases, of which there have been a good many, I think there are indications, if not decisions, that this is the right view. For these reasons I think that the money recovered from the wife — the 520*l.* — is applicable in paying exclusively that debt against which the trustee is entitled to be indemnified, and therefore that the 520*l.* is payable to the governors of St. Thomas's Hospital.

*Appeal allowed.*¹

In re OXLEY.

JOHN HORNBYS & SONS *v.* OXLEY.

COURT OF APPEAL. 1914.

[1914] 1 Ch. 604.

COZENS-HARDY, M.R.² This is an appeal from a decision of Joyce J., and it raises a point which has been presented to us in very able arguments as one of great difficulty. I am, however, bound to say I do not feel pressed with any of the suggested difficulties. The case is one in which a boilermaker made a will and appointed as executors his widow and one of his sons. The widow was the sole residuary legatee. The estate as sworn to by the executors for the purposes of probate was solvent, and I have not heard anything to satisfy me or even to suggest the probability that the estate was not perfectly solvent at the death.

¹ See *First Nat. Bk. v. Thompson*, 61 N. J. Eq. 188. As to the right of a creditor on a promise made by a third person to the debtor to pay the debt, see 15 Harv. L. Rev. 777.

² The statement of facts and a part of the opinion, together with concurring opinions of Buckley and Phillimore, L. JJ., are omitted.

The will contained no provision whatever as to carrying on the business. There was no trust to that effect in the will, but the widow, who was obviously dependent upon what she could get from the business for her maintenance, carried the business on with the aid of the son who was co-executor and three other sons who were employed in the business and who received wages. The result was that the widow received from 3*l.* to 30*s.* a week, which supported and maintained her until the time arrived in the autumn of 1912 when the executors, who had carried on the business under the style of "Executors of Barker Oxley," got into difficulties, and execution was put in. That was followed by bankruptcy proceedings. It was also followed by an action, which is the one before us, commenced by John Hornby & Sons and J. Utley on behalf of themselves and all other the creditors of the testator against the executors. Now what was that action, and what was the decree that was made in it? It was a common administration decree. The only order that was made was for an account of the assets of the testator. I do not read the form because it is a perfectly well known common form. There is nothing whatever in it about assets which were produced by the trading subsequent to the death. It has nothing whatever to do with that, it is simply a proceeding in which admitted creditors say that there are assets of the testator which are still *bona testatoris* in existence and that they must be applied in payment of their debts. But then it is said that the executors carried on the testator's business for three or four years, and that they did it openly; they traded as executors. The creditors must have known and I assume did know, I think it is proved they did know, that the business was being carried on by the executors; and it is said there is something which entitles the executors to have a lien upon all the assets of the testator to indemnify them against the liabilities which they have incurred in carrying on this business; and it is said first of all that *Dowse v. Gorton*, [1891] A. C. 190, decides this in their favour. Now *Dowse v. Gorton* seems to me to be a case which is very strongly against the application and certainly is not in favour of it. *Dowse v. Gorton* was a case where there was a trust to carry on the business; a trust of course which bound the beneficiaries under the will, bound them to give, not a personal indemnity, but an indemnity out of the estate in favour of the trustees who in the due exercise of that trust carried on the business. Then came the further question,

were the creditors bound to give the same indemnity? Had they in fact put themselves in the true legal position of being beneficiaries or *cestuis que trust* under the trust contained in the will? It was held there, in circumstances to which I must briefly refer, that they had put themselves into that position, and that they could not in those proceedings and having regard to the view which they themselves had taken in that action be allowed to approbate and to reprobate at the same time. Now the proceedings there which were taken were by originating summons by one of the true creditors of the testator which asked not merely that all the assets of the testator at the date of the testator's death, but that everything which was in existence at the date when the business ceased to be carried on by the executors, should be applied in payment of the debts of the testator, and in priority to any claim for indemnity by the executors — that is to say, those creditors sought to get the benefit of the subsequent trading without any provision for giving indemnity to the persons who had produced those assets. Now anything more unlike than the present case to *Dowse v. Gorton* I cannot imagine. The plaintiffs here have never claimed the subsequent assets, which have nothing to do with them; they have taken simply a common administration decree. But in *Dowse v. Gorton* the House of Lords, following the Court of Appeal, except in one respect, went into considerations which satisfied the noble Lords that there was an actual assent to the executors carrying on this business for the benefit of the creditors, and that being so it was not difficult to arrive at the conclusion which seems to me inevitably to have followed, that the creditor who had given that assent was in precisely the same position as a beneficiary under the will, and just as a beneficiary under the will could not take the subsequent assets without giving effect to the indemnity, so the creditor who deliberately elected to come in could not get the benefit of the subsequent assets without giving effect to the indemnity. That really is I think the substance of *Dowse v. Gorton*. Lord Macnaghten gave a very elaborate and valuable judgment as to the rights of a creditor of a testator in a case like that, and he points out that if the creditor knows of the trading and is minded to do so he can take proceedings against the executors for a breach of trust for endangering the assets in carrying on the business more than may be required for the necessary disposal of the assets of the business. To me it is quite startling to suggest that a creditor

of a testator, having a knowledge of that which he might claim to be a breach of trust, is bound by abstaining from taking proceedings to admit that the business was carried on with his assent and that he for all purposes must be deemed to have assented to that breach of trust. Take any other breach of trust than this. A creditor may know that executors have invested 10,000*l.* forming part of the estate in an improper security which has been lost. Is he to be deemed to have acquiesced in that, and to be debarred from claiming to be paid out of the true assets of the testator's estate which are left after the loss by reason of the breach of trust? I think the proposition really scarcely requires to be more than stated. . . .

*The appeal will be dismissed with costs.*¹

PHILIP CAREY COMPANY v. PINGREE.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1916.

223 Mass. 352.

CARROLL, J. This is an action for work and material. The defendants are trustees of the Melrose Real Estate Trust. They contend that they are not liable, because the work and material were furnished to the trust and the contract was signed by them not, as individuals, but as trustees. At the trial, against the exception of the plaintiff, the defendants introduced evidence of an oral agreement, made before the written contract was signed, by which the plaintiff agreed not to look to the defendants for payment.

The jury found in answer to a question, that there was no such oral agreement, and also found for the plaintiff. The case is here on a report made by the judge at the request of the defendants,

¹ *Re Millard*, 72 L. T. N. S. 823; *Willis v. Sharp*, 115 N. Y. 396 (*semble*); *Morrow v. Morrow*, 2 Tenn. Ch. 549, *accord*.

But if the business is carried on with the consent of the testator's creditors and for their benefit, the new creditors take precedence over the testator's creditors. *Ex parte Garland*, 10 Ves. 110; *Dowse v. Gorton*, [1891] A. C. 190; *Re Hodges*, [1899] 1 I. R. 480; *Re Frith*, [1902] 1 Ch. 342. See *Brooke v. Brooke*, [1894] 2 Ch. 600; *Healy v. Oliver*, [1918] 1 I. R. 366. The result is the same even in the absence of consent of the testator's creditors where the business is carried on temporarily until it can be sold as a going concern. *Wright v. Beatty*, 2 Alberta 89. *Cf. O'Neill v. McGrorty*, [1915] 1 I. R. 1, 15. See *Williams, Executors*, 10 ed., 1430, 1554, 1634.

which is in substance, that if no error of law appears, judgment is to be entered for the plaintiff.

The defendants attempted to prove that there was this oral agreement, earlier in date than the written. Even if this evidence were admissible, they cannot now complain of any error of law, since the jury found, as a fact, that there was no such agreement.

By adding the word "trustee" to their names, the defendants did not exempt themselves from personal responsibility, nor did they, by such a signature, provide that the plaintiff was to look solely to the trust estate. *Carr v. Leahy*, 217 Mass. 438.

According to the terms of the report, judgment is to be entered for the plaintiff, for the sum of \$725.71 and interest from the date of the verdict.

*So ordered.*¹

JESSUP *v.* SMITH *et al.*, AS TRUSTEES, *et al.*

COURT OF APPEALS, NEW YORK. 1918.

223 N. Y. 203.

CARDOZO, J. In October, 1913, George W. Smith was one of the trustees under the will of Samuel J. Tilden. Lewis V. F. Randolph was a co-trustee. The two trustees had power to select a third to fill the vacancy created by the death of John Bigelow. They could not agree upon a choice. They differed

¹ *Muir v. City of Glasgow Bk.*, 4 App. Cas. 337, 352 (*semble*; "as trustee disponents"); *Duvall v. Craig*, 2 Wheat. (U. S.) 45 ("T, trustee for C"); *Taylor v. Davis' Adm'x*, 110 U. S. 330 ("T, trustee of C"); *Hall v. Jameson*, 151 Cal. 606 ("T. trustee"); *Knipp v. Bagby*, 126 Md. 461 ("T, trustee"); *Dunham v. Blood*, 207 Mass. 512 ("Estate of C by T, trustee"; trustee contracting without authority); *Rosenthal v. Schwartz*, 214 Mass. 371 ("T, as he is the administrator of the estate of C"); *Carr v. Leahy*, 217 Mass. 438 ("T, as trustee"); *McGovern v. Bennett*, 146 Mich. 558 ("C Estate by T, trustee"); *Peterson v. Homan*, 44 Minn. 166 ("T, trustee for C"; trustee contracting without authority); *Germania Bk. v. Michaud*, 62 Minn. 459 ("Estate of C by T, administrator"); *Koken Iron Works v. Kinealy*, 86 Mo. App. 199 ("T, trustee"); *Pumpelly v. Phelps*, 40 N. Y. 59 ("T, trustee"); *Whalen v. Ruegamer*, 123 N. Y. App. Div. 585 ("T, trustee"); *Dunlevie v. Spangenberg*, 66 N. Y. Misc. 354 ("T, trustee"); *Ogden Ry. Co. v. Wright*, 31 Ore. 150 ("T, as trustee of C"); *McLeod v. Despain*, 49 Ore. 536 ("T, trustee"); *Roger Williams Nat. Bk. v. Groton Mfg. Co.*, 16 R. I. 504 ("T, trustee, estate of C"); *McDowall v. Reed*, 28 S. C. 466 ("T, trustee"); *Moss v. Johnson*, 36 S. C. 551 ("T, trustee"); *Jordan v. Trice*, 6 Yerg. (Tenn.) 479 ("T, as trustee"); *Warren v. Harrold*, 92 Tex. 417 ("T, assignee"); *McIntyre v. Williamson*, 72 Vt. 183 ("T, trustee"), *accord*.

also in respect of other problems of administration. A deadlock had been reached, which threatened, as the findings state, the orderly and efficient execution of the trust.

Some of the beneficiaries under the will, in union with Mr. Randolph, began a proceeding in the Supreme Court for the removal of Mr. Smith, and for the appointment of Mr. Cornelius B. Tyler as his successor. They alleged that there was lack of harmony between the trustees which was injuring the estate, and they charged Mr. Smith with inefficiency and misconduct. Upon the service of this petition, Mr. Smith retained the present plaintiff, Mr. Jessup. He told Mr. Jessup that he was poor, and unable to pay the fees of counsel, who would have to look to the estate for payment. The finding is that Mr. Jessup "agreed to accept such retainer, and to render his professional services in the premises on the faith of the trust estate and with knowledge of the poverty of the defendant, George W. Smith, as trustee, and his inability personally to pay for such service."

Under that retainer, Mr. Jessup opposed the application for the removal of his client. He made at the same time a cross-application to appoint a third trustee. In all that he did, he was successful. The application to remove was denied. The cross-application was granted. The Hon. Charles F. MacLean, for many years a justice of the Supreme Court, was named as the third trustee. On appeal to the Appellate Division the order was affirmed.

The plaintiff then began this action, joining as defendants all persons interested in the estate, and praying that the value of his services be declared a charge upon the trust, which consists of money and securities. The trial judge found that the services had been rendered; found that the opposition to the attempted removal was just and reasonable; found that the value of the services was \$1,750; but held that the services were beneficial to Mr. Smith personally, and not to the estate. Judgment was therefore granted dismissing the complaint. At the Appellate Division, the judgment was affirmed by a divided court. The affirmance was put upon the ground that the contract of retainer bound the client personally. *Ferrin v. Myrick*, 41 N. Y. 315; *Austin v. Munro*, 47 N. Y. 360; *Parker v. Day*, 155 N. Y. 383; *O'Brien v. Jackson*, 167 N. Y. 31. The client, it was held, must pay the counsel fees himself, and seek reimbursement from the estate upon the settlement of his accounts.

We reach a different conclusion. Undoubtedly, the general

rule is as the Appellate Division has declared it. But there are exceptions as settled as the rule itself. A trustee who pays his own money for services beneficial to the trust, has a lien for reimbursement. But if he is unable or unwilling to incur liability himself, the law does not leave him helpless. In such circumstances, he "has the power, if other funds fail, to create a charge, equivalent to his own lien for reimbursement, in favor of another by whom the services are rendered." *Schoenherr v. Van Meter*, 215 N. Y. 548, 552; *New v. Nicoll*, 73 N. Y. 127, 131; *Noyes v. Blakeman*, 6 N. Y. 567; *Van Slyke v. Bush*, 123 N. Y. 47, 51; *O'Brien v. Jackson*, *supra*, 36; *Clapp v. Clapp*, 44 Hun, 451; *Randall v. Dusenbury*, 7 J. & S. 174; 63 N. Y. 645. That is exactly what this trustee assumed to do. He was unable to pay; he explained the situation to the plaintiff; he was exonerated from personal liability; and the acceptance of the retainer was, by express agreement, on the credit of the estate.

The question remains whether the services were beneficial in the preservation of the trust. We have no doubt that they were. Mr. Smith had been named in the will as a trustee. He owed a duty to the estate to stand his ground against unjust attack. He resisted an attempt to wrest the administration of the trust from one selected by the testator and to place it in strange hands. He did more. By his cross-application, he procured the appointment of a third trustee, and broke a deadlock which threatened the safety of the estate. Plainly, such services, if paid for by the trustee personally, would justify reimbursement on his accounting before the surrogate. *Matter of Ordway*, 196 N. Y. 95, 98; *Matter of Higgins*, 80 Misc. Rep. 609; *Matter of Assignment of Cadwell's Bank*, 89 Iowa, 533, 542; *Lycan v. Miller*, 56 Mo. App. 79. That must be because they were beneficial to the trust. But reimbursement on an accounting before the surrogate presupposes payment in advance. Code Civ. Pro., former sections 2729, 2730, 2810; present sections, 2726, 2731, 2732, 2753; *Matter of Blair*, 49 App. Div. 417; *Matter of Spooner*, 86 Hun, 9. There must, therefore, be some other remedy where such payment is impossible. If that were not so, there would be no safety either for an indigent trustee or for the estate committed to his care. The law is too far-sighted to invite such consequences.

The judgment of the Appellate Division and that of the Special Term should be reversed, and the plaintiff should be decreed to have a lien upon the trust estate for \$1,750 with in-

terest from June 8, 1915, and costs in all courts. If any further directions become necessary for the enforcement of the lien, they may be made by the Supreme Court on the application of either party.

HISCOCK, Ch. J., CHASE, HOGAN, POUND and ANDREWS, JJ., concur; McLAUGHLIN, J., not sitting. *Judgment accordingly.*¹

RHODE ISLAND HOSPITAL TRUST CO. v.
COPELAND.

SUPREME COURT, RHODE ISLAND. 1916.

39 R. I. 193.

VINCENT, J. This is a bill for instructions by the complainant as executor and trustee under the will of William A. Copeland, late of the city of Providence, deceased.

¹ A trustee who signs "as trustee but not individually," or otherwise indicates an intention not to be personally bound, is not personally liable. *Thayer v. Wendell*, 1 Gall. (U. S.) 37; *Glenn v. Allison*, 58 Md. 527; *Shoe & Leather Nat. Bk. v. Dix*, 123 Mass. 148; *Hussey v. Arnold*, 185 Mass. 202 (*semble*); *King v. Stowell*, 211 Mass. 246 ("Estate of X, by T. trustee"); *Rand v. Farquhar*, 226 Mass. 91; *Packard v. Kingman*, 109 Mich. 497 (*semble*); *Brackett v. Ostrander*, 126 N. Y. App. Div. 529. It was held otherwise in *Watling v. Lewis*, [1911] 1 Ch. 414. See also *Furnivall v. Coombes*, 5 M. & G. 736. But in *Re Robinson's Settlement*, [1912] 1 Ch. 717, 728, it was said by the Court of Appeal that the trustee is not liable. Cf. *Williams v. Hathaway*, 6 Ch. D. 544, where there was a limitation on, but not a total exemption from, personal liability.

As to the liability of the trust estate when the trustee has exempted himself from liability, see *Gisborn v. Charter Oak Ins. Co.*, 142 U. S. 326; *Noyes v. Blakeman*, 6 N. Y. 567; *New v. Nicoll*, 73 N. Y. 127; *O'Brien v. Jackson*, 167 N. Y. 31; *Fowler v. Mutual Life Ins. Co.*, 28 Hun (N. Y.) 195; *Wadsworth etc. Co. v. Arnold*, 24 R. I. 32. See *Bushong v. Taylor*, 82 Mo. 660. Cf. *Bank of Topeka v. Eaton*, 100 Fed. 8, *aff'd s. c.*, 107 Fed. 1003. In *King v. Stowell*, 211 Mass. 246, it was said that the right of the creditor against the trust estate is dependent upon the trustee's right to exoneration. See *Clack v. Holland*, 19 Beav. 262.

If the trustee properly mortgages or pledges the trust estate, the creditor has a direct right against the estate. *Re Bellinger*, [1898] 2 Ch. 534; *Gilbert v. Penfield*, 124 Cal. 234; *Townsend v. Wilson*, 77 Conn. 411; *Iowa L. & T. Co. v. Holderbaum*, 86 Iowa 1; *Roberts v. Hale*, 124 Iowa 296; *Warren v. Pazolt*, 203 Mass. 328; *Packard v. Kingman*, 109 Mich. 497.

As to the power of a trustee to mortgage or pledge trust property, see *Smith v. Ayer*, 101 U. S. 320; *Tuttle v. First Nat. Bk.*, 187 Mass. 533; *Gibney v. Allen*, 156 Mich. 301; *First Nat. Bk. v. Nat. Broadway Bk.*, 156 N. Y. 459; *Perry, Trusts*, sec. 768.

The bill recites that the complainant in its said capacities holds 625 shares of the so-called preferred stock of the Martin-Copeland Company, and that these shares will probably constitute from eighteen to twenty-two per cent. in value of the residuary trust estate. The Martin-Copeland Company is not a corporation, but is organized and exists by virtue of a written agreement, dated August 8, 1912.¹ . . .

William A. Copeland deceased on March 14, 1913, leaving a last will and testament. By this will the complainant was appointed executor and also trustee under certain trusts thereby created. The property thus placed in trust includes the 625 shares in the Martin-Copeland Company. The complainant duly qualified as executor and has now reached the point in its administration of the estate where it is ready to transfer the residue to itself as trustee.

At this juncture the complainant alleges that it has become uncertain as to some questions involving the interpretation of the agreement of August 8, 1912, under which the Martin-Copeland Company was organized, and especially as to the liability of the holders of the so-called preferred stock thereof; the liability of the trustee when it shall come to hold the same under the trusts imposed by the will of William A. Copeland, and as to the proper management and disposition of such stock by the trustee after it shall have been duly transferred to it, and has formulated its request for instructions as follows: "a. Whether under said agreement the persons interested therein, the holders of the so-called preferred stock, are or are not under individual and personal liability for any of the obligations or indebtedness of the said trust or association, and if so whether the general estate of the said William A. Copeland beyond the amount represented by said shares remains and will remain liable until a transfer of said shares.

"b. Whether your orator as executor or trustee can continue to hold said shares of so-called preferred stock without making itself liable in its own corporate capacity for any obligation or indebtedness of said trust or association.

"c. Your orator is further in doubt whether, even if it will incur no personal liability under said agreement, it is proper for it to continue to hold as trustee all of said shares of stock or any part of them, or whether it ought to convert into cash the

¹ A part of the opinion in which the agreement is set forth at length is omitted.

whole or some part thereof and reinvest the proceeds in other trust securities." ¹

The first question to be determined is whether those interested in the business of the Martin-Copeland Company, called stockholders, are personally liable to creditors as copartners. In other words, is the Martin-Copeland Company a copartnership and the several holders of shares therein individually liable for its debts or is it a true trust where such holders are only *cestuis que trustent*?

In considering this question we must first look to the terms of the agreement of August 8, 1912. It is entitled "An Agreement and Declaration of Trust." It commences with a declaration of trust and its further provisions embraced in some forty paragraphs may be briefly summarized.

The name of the company is fixed, provision is made for the issue of shares, preferred and common, to be represented by certificates; the trustees are authorized to acquire, hold and dispose of shares in the same manner as though they were not trustees; the shares are made transferable both by act of the party, owner or by operation of law; the shareholders' rights are defined; title to the property is to be in the trustees only; they are given the most ample powers to deal with the property forming the subject-matter of the trust; they are authorized to make by-laws and regulations; to represent the shareholders in legal proceedings; to indemnify themselves or any of them from the trust property for liabilities incurred in the carrying out of the trust; to determine what is income and what is capital for the purposes of the trust.

The number of trustees is fixed at not more than four. They are authorized to appoint officers; the authority of the officers is outlined; provision is made for the appointment of new trustees and for authority to one or more of the trustees to delegate their powers to another of the trustees. They are authorized to call meetings of the common shareholders at any time they see fit and are required to do so on request of the holders of twenty-five per cent. of the common shares outstanding. Provision is made for the warning of meetings of the common shareholders; for the voting at such meetings by proxy and for share votes, forty per cent. of the outstanding common shares being required for a quorum.

¹ A part of the opinion on point "c" is omitted. The court refused to decide this point without further information.

The trustees are empowered to fix the compensation of officers and agents; they are especially prohibited from binding the shareholders personally and the latter are not to be liable for any assessment. The trustees' acts within the powers conferred by the agreement and declaration are done as trustees and not individually and persons contracting with the trustees are required to look to the fund and not to the trustees personally, nor to the stockholders for payment. No bond is required of any trustee and each is liable only for his own wilful breach of trust. Anyone paying money or other property to the trustees is not required to see to the application of the money or property.

The trustees are given power to declare dividends on both classes of shares, but the amount and payment of them is in the sole discretion of the trustees, except that preferred dividends shall be at the rate of six per cent. per annum, and no more, and they have priority over common dividends. They are empowered also to create a reserve or surplus fund.

Provision is made for amending the agreement and declaration on certain conditions and in a certain manner. The trusts may be terminated by two-thirds vote of the common shareholders and they are limited in any event to twenty-one years after the death of certain identified persons. Thereupon the affairs of the trust are to be wound up in a specified manner.

The respondents have in their brief referred to and commented upon some of the earlier English cases in which the sharing of profits was the test applied in determining whether or not a partnership existed. While these cases are interesting and instructive they do not demand any particular notice at this time.

In the year 1860 the case of *Cox v. Hickman*, 8 H. of L. 268, after having passed through the inferior courts where the old "sharing profit" test had been applied and a partnership found to exist, reached the House of Lords for final decision. The decision was unanimous. Lord Cranworth said in his opinion: "The liability of one partner for the acts of his co-partner is in truth the liability of a principal for the acts of his agent," and Lord Wensleydale said: "The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy the solution, the questions which arise on this subject, if this true principle were more constantly kept in view."

Though the case of *Cox v. Hickman* may have brought into existence the test of principal and agent as embodied in a judicial decision, such test had long before been suggested for we find in Story on Partnership, Section 1 (1841), "Every partner is an agent of the partnership; and his rights, powers, duties, and obligations, are in many respects, governed by the same rules and principles, as those of an agent. A partner, indeed, virtually embraces the character both of principal and of an agent."

In *Cox v. Hickman*, Smith & Son, ironmongers, etc., were embarrassed. A creditors' meeting was held. The creditors could force bankruptcy and through a trustee take possession of the plant and business. Instead they elected five trustees, who took over the plant and business and ran the same for the creditors with a provision for its being turned back to Smith & Son when the creditors were paid. Two persons named as trustees, the defendants, who were also creditors, refused to act as trustees. A debt was contracted by the acting trustees. It was represented by a promissory note. The note was not paid. Suit was brought against the defendants to charge them as partners because of their signing the deed and agreeing to take the profits of the business as conducted by the acting trustees and upon this point Lord Cranworth said: "I have hitherto considered the case as it would have stood if the creditors had been merely passively assenting parties to the carrying on of the trade, on the terms that the profits should be applied in liquidation of their demands. But I am aware that in this deed special powers are given to the creditors, which, it was said, showed that they had become partners, even if that had not been the consequence of their concurrence in the previous trust. The powers may be described briefly as, first, a power of determining by a majority in value of their body, that the trade should be discontinued, or, if not discontinued, then secondly, a power of making rules and orders as to its conduct and management.

"These powers do not appear to me to alter the case. The creditors might, by process of law, have obtained possession of the whole of the property. By the earlier provisions of the deed, they consented to abandon that right, and to allow the trade to be carried on by the trustees. The effect of these powers is only to qualify their consent. They stipulate for a right to withdraw it altogether; or, if not, then to impose terms

as to the mode in which the trust to which they had agreed should be executed; I do not think that this alters the legal condition of the creditors. The trade did not become a trade carried on for them as principals, because they might have insisted on taking possession of the stock, and so compelling the abandonment of the trade, or because they might have prescribed terms on which alone it should be continued. Any trustee might have refused to act, if he considered the terms prescribed by the auditors to be objectionable. Suppose the deed had stipulated, not that the creditors might order the discontinuance of the trade, or impose terms as to its management, but that some third person might do so, if, on inspecting the accounts, he should deem it advisable; it could not be contended that this would make the creditors partners, if they were not so already; and I can see no difference between stipulating for such a power to be reserved to a third person, and reserving it to themselves."¹ . . .

When we examine the agreement of August 8, 1912, under which the Martin-Copeland Company was organized, in the light of the authorities which we have cited, we cannot escape the conclusion that such agreement evidences both in intention and in law a true trust and not a partnership.

It is therefore our decision that under said agreement, the persons interested therein, the holders of the so-called preferred stock are not under individual and personal liability for any of the obligations or indebtedness of the said trust or association; that the estate of William A. Copeland will not be liable for the obligations or indebtedness of said trust or association, beyond the amount represented by the shares belonging thereto, and that the complainant as executor or trustee can continue to hold said shares of so-called preferred stock without making itself liable in its own corporate capacity for any obligation or indebtedness of said trust or association. . . .

The cause is remanded to the Superior Court with our decision certified thereon for further proceedings.²

¹ The court here discussed *Wells-Stone Co. v. Grover*, 7 N. D. 460; *Smith v. Anderson*, 15 Ch. D. 247; *Williams v. Milton*, 215 Mass. 1.

² See *Smith v. Anderson*, 15 Ch. D. 247; *Re Siddall*, 29 Ch. D. 1; *Mayo v. Moritz*, 151 Mass. 481; *Williams v. Milton*, 215 Mass. 1; *Wells-Stone Mercantile v. Grover*, 7 N. D. 460, in which it was held that no partnership or agency was created. Such trusts are not taxable as corporations. *Eliot v. Freeman*, 220 U. S. 178.

But the beneficiaries may retain such a control over the administration

of the trust as to make them partners or principals. *Hoadley v. County Commissioners*, 105 Mass. 519; *Whitman v. Porter*, 107 Mass. 522; *Phillips v. Blatchford*, 137 Mass. 510; *Ricker v. American L. & T. Co.*, 140 Mass. 346; *Williams v. Boston*, 208 Mass. 497; *Frost v. Thompson*, 219 Mass. 360; *Priestley v. Treasurer*, 230 Mass. 452. *Cf. Re Associated Trust*, 222 Fed. 1012.

On the question whether a provision that the trust shall not be terminated except by a vote of a certain fraction of the certificate holders violates the policy of the Rule against Perpetuities, see *Howe v. Morse*, 174 Mass. 491. And see *Hart v. Seymour*, 147 Ill. 598; *Pulitzer v. Livingston*, 89 Me. 359. In some states there are statutes limiting the period during which a trust may continue. See Mich. Comp. L., 1915, sec. 11575; Minn. Gen. Stat., 1913, sec. 6710.

For a general discussion of problems relating to trusts for unincorporated associations, see 3 Maitland, *Collected Papers*, 271-284, 321-404; Smith, *Law of Associations*; Wertheimer, *Law of Clubs*, 4 ed.; Chandler, *Express Trusts*; Sears, *Trust Estates as Business Companies*; Wrightington, *Unincorporated Associations*. See 29 Harv. L. Rev. 404; 2 Minn. L. Rev. 401. For a variety of forms of trust agreements used in various business enterprises, especially in real estate trusts, see Wrightington, *Unincorporated Associations*, Appendix of Forms; Sears, *Trust Estates as Business Companies*, Appendix of Exhibits.

On the subject-matter of this section, see Brandeis, *Liability of Trust-Estates on Contracts made for their Benefit*, 15 Amer. L. Rev. 449; Scott, *Liabilities Incurred in the Administration of Trusts*, 28 Harv. L. Rev. 725.

CHAPTER IX.
THE INVESTMENT OF TRUST FUNDS.

Ex parte CATHORPE.

CHANCERY. 1785.

1 Cox Eq. Cas. 182.

UPON an application to lay out on a mortgage a sum of 3,000*l.* in the hands of the Accountant General, belonging to the lunatic's estate, *Madocks* produced several orders of the same nature, which had been made in this very lunacy. But the LORD CHANCELLOR [THURLOW] said, that although he was perfectly convinced, by what was stated to him, that this security was perfectly good, yet he could not permit such a precedent to be made; and that he was aware that in former times the Court had laid out the money not only of lunatics but of infants in this manner; but in latter times the Court had considered it as improper to invest any part of the lunatic's estate upon a private security, and it would be a dangerous precedent to break in upon that rule; and he therefore directed the money to be laid out in the 3 per cent. Bank annuities.¹

¹ Although in some of the early cases a different view was taken, Lord Thurlow's view came to be generally approved in England. *Lewin, Trusts*, 346. But in 1859 by Lord St. Leonards' Act (22 & 23 Vict. c. 35), sec. 32, first mortgages on land in any part of the United Kingdom, as well as stock in the Bank of England or Ireland or East India stock, were authorized. By subsequent statutes the scope of trust investments has been further enlarged. See Trustee Act, 1893 (56 & 57 Vict. c. 53), secs. 1-9. In the United States investments in first mortgages on real estate have been generally upheld without statutory authorization.

In some jurisdictions it is a breach of trust to invest in second mortgages; but in others although presumptively such investments are improper, they are not absolutely prohibited. See *Norris v. Wright*, 14 Beav. 291; *Want v. Campain*, 9 T. L. R. 254; *Chapman v. Browne*, [1902] 1 Ch. 785; *Waring v. Waring*, 3 Ir. Ch. 331; *Smithwick v. Smithwick*, 12 Ir. Ch. 181; *Crampton v. Walker*, 31 L. R. Ir. 437; *Shuey v. Latta*, 90 Ind. 136; *Mattocks v. Moulton*, 84 Me. 545; *Gilbert v. Kolb*, 85 Md. 627; *Taft v. Smith*, 186 Mass. 31; *Gilmore v. Tuttle*, 32 N. J. Eq. 611, 36 N. J. Eq. 617; *Porter v. Woodruff*, 36 N. J. Eq. 174; *King v. Mackellar*, 109 N. Y. 215; *Re Blauvelt's Est.*,

In re SALMON.

PRIEST v. UPPLEBY.

COURT OF APPEAL. 1889.

42 Ch. D. 351.

COTTON, L. J.¹ This is an appeal by the plaintiff from a decision of Mr. Justice Kekewich dismissing an action brought against Uppleby, a retired trustee of the will of Eliza Salmon, to make him responsible for an improper investment.

There are two questions to be considered. The first is, whether the investment in question was wrongful. It was within the terms of the trust, for it was an investment on mortgage of a freehold estate. In one sense, therefore, it was in accordance with the trusts, and if the trustee took due care as to its sufficiency there would be no breach of trust, and nobody could complain, though it ultimately proved insufficient. The case differs from that of an investment not within the terms of the instrument, which is necessarily a breach of trust, so that if any loss occurs the trustees must be liable for it. The question here is, whether Uppleby took proper care in seeing to the sufficiency of the security.

20 N. Y. Supp. 119; *Reach's Est.*, 50 Ore. 179; *Jack's Appeal*, 94 Pa. 367; 44 L. R. A. (N. S.) 911-917. See also Ames, 485; *Lewin, Trusts*, 285. In several states statutes authorize mortgages on unencumbered real estate only.

Equitable mortgages are usually not permitted. *Webb v. Ledsam*, 1 K. & J. 385; *Re Turner*, [1897] 1 Ch. 536; *Swaffield v. Nelson*, W. N. (1876) 255.

Leasehold mortgages have been held improper. Ames, 485; *Lewin, Trusts*, 381, 382; 44 L. R. A. (N. S.) 917. But they are allowed in England by the Trustee Act, 1888 (51 & 52 Vict. c. 59), sec. 9, in the case of an unexpired term of not less than 200 years and not subject to any reservation of rent greater than one shilling a year. See Trustee Act, 1893 (56 & 57 Vict. c. 53), sec. 5.

As to contributory or participating mortgages, see *Webb v. Jonas*, 39 Ch. D. 660; *Re Dive*, [1909] 1 Ch. 328; *McCullough v. McCullough*, 44 N. J. Eq. 313; *Doud v. Holmes*, 63 N. Y. 635. As to trust companies, see *Re Union Trust Co.*, 219 N. Y. 514; N. Y. Laws, 1917, c. 385, 1918, c. 544; Ohio Code, sec. 9788.

As to a mortgage of an undivided moiety and of a reversionary interest, see *Re Turner*, [1897] 1 Ch. 536. See also *Jones v. Julian*, 25 L. R. Ir. 45.

An investment in a judgment lien has been held improper. *Rochfort v. Seaton*, [1896] 1 I. R. 18.

¹ Only the opinion of Cotton, L. J., upon the propriety of the investment is given.

Now as regards the rule which has been so much discussed, as to the amount which may be lent on a given security, the law is thus summed-up in *Learoyd v. Whiteley*, 12 App. Cas. 727, 733: "As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate. Business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard. So, so long as he acts in the honest observance of these limitations, the general rule already stated will apply. The courts of equity in England have indicated and given effect to certain general principles for the guidance of trustees in lending money upon the security of real estate. Thus it has been laid down that in the case of ordinary agricultural land the margin ought not to be less than one-third of its value; whereas in cases where the subject of the security derives its value from buildings erected upon the land, or its use for trade purposes, the margin ought not to be less than one-half. I do not think these have been laid down as hard and fast limits up to which trustees will be invariably safe, and beyond which they can never be in safety to lend, but as indicating the lowest margins which in ordinary circumstances a careful investor of trust funds ought to accept."¹ These

¹ In *Re Whiteley*, 33 Ch. Div. 347, 355, Lindley, L. J., thus stated the rule: "The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide." See s. c. 12 App. Cas. 727, 733. Lord Northington on the other hand in *Harden v. Parsons*, 1 Eden 145, 148, in 1758, said: "No man can require or with reason expect a trustee to manage another's property with the same care and discretion that he would his own." In his lectures on *The Duties and Liabilities of Trustees*, Birrell said (p. 26): "Lord Northington indeed, who was a very strong man and an able though somewhat hastily got up lawyer, electrified Lincoln's Inn more than a hundred years ago by this *obiter dictum*. . . . But, however shrewd this remark may be as an apothegm or criticism of life, it is bad law, and it is never cited save for the purpose of receiving censure." See *Mattocks v. Moulton*, 84 Me. 545; *Hart's Estate* (No. 1), 203 Pa. 480.

rules are there recognized, though they have been impeached by Mr. Warmington and Mr. Wood. In the present case the value of the property was mainly derived from buildings. I do not think that the valuation of the property has been successively impeached. We must take the property as having been worth 1750*l.* The trustees lent 1300*l.* upon it. Now, we must have regard not only to the value, but to the nature of the property. It consisted of small houses let at weekly rents, and we know the class of tenants likely to be attracted by cottage property in Hull. It was certainly not prudent to lend to this extent upon property the value of which depended on laborers' houses being wanted in that part of Hull. The investment, therefore, was a breach of trust as having been made improvidently.¹ . . .

DICKINSON, APPELLANT.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1890.

152 Mass. 184.

APPEAL from a decree of the Probate Court, disallowing in part the account of William A. Dickinson as trustee under a deed of trust. Hearing before C. Allen, J., who reported the case for the determination of the full court.² . . .

FIELD, C. J. The general principles which should govern a trustee in making investments, when the creator of the trust has given no specific directions concerning investments, have been repeatedly declared by this court. *Harvard College v. Amory*, 9 Pick. 446; *Lovell v. Minot*, 20 Pick. 116; *Brown v. French*, 125 Mass. 410; *Bowker v. Pierce*, 130 Mass. 262; *Hunt*, appellant, 141 Mass. 515.

The rule in general terms is, that a trustee must in the investment of the trust fund act with good faith and sound discretion, and must, as laid down in *Harvard College v. Amory*, at page 461, "observe how men of prudence, discretion, and intelligence

¹ *Gilbert v. Kolb*, 85 Md. 627; *Taft v. Smith*, 186 Mass. 31, *accord*. See Ames, 488*n*.

For the present English rule, see Trustee Act, 1893 (56 & 57 Vict. c. 53), sec. 8 (not more than two-thirds of the value as reported by a surveyor or valuer). By similar statutes in the United States the margin is not uncommonly, either by decision or statute, fifty or sixty per cent. of the value of the property. See McKinney, *Liabilities of Trustees for Investments*.

² The judge's report is omitted.

manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested."

It is said in the opinion in *Brown v. French*, *ubi supra*: "If a more strict and precise rule should be deemed expedient, it must be enacted by the Legislature. It cannot be introduced by judicial decision without working great hardship and injustice." It is also said, "The question of the lawfulness and fitness of the investment is to be judged as of the time when it was made, and not by subsequent facts which could not then have been anticipated." A trustee in this Commonwealth undoubtedly finds it difficult to make satisfactory investments of trust property. The amount of funds seeking investment is very large; the demand for securities which are as safe as is possible in the affairs of this world is great; and the amount of such securities is small, when compared with the amount of money to be invested. Trusts frequently provide for the payment of income to certain persons during their lives, as well as for the ultimate transfer of the corpus of the trust property to persons ascertained, or to be ascertained, at the termination of the trust; and a trustee must, so far as is reasonably practicable, hold the balance even between the claims of the life tenants and those of the remaindermen. The life tenants desire a large income from the trust property, but they are only entitled to such an income as it can earn when invested in such securities as a prudent man investing his own money, and having regard to the permanent disposition of the fund, would consider safe. A prudent man possessed of considerable wealth, in investing a small part of his property, may wisely enough take risks which a trustee would not be justified in taking. A trustee, whose duty it is to keep the trust fund safely invested in productive property, ought not to hazard the safety of the property under any temptation to make extraordinary profits. Our cases, however, show that trustees in this Commonwealth are permitted to invest portions of trust funds in dividend paying stocks and interest bearing bonds of private business corporations, when the corporations have acquired, by reason of the amount of their property, and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments.

The experience of recent years has, perhaps, taught the whole community that there is a greater uncertainty in the permanent value of railroad properties in the unsettled or newly settled parts of this country than was anticipated nine years ago. Without, however, taking into consideration facts which are now commonly known, and confining ourselves strictly to the evidence in the case, and the considerations which ought to have been present to the mind of the appellant, when in May and August, 1881, he made the investments in the stock of the Union Pacific Railroad Company, we think it appears that he acted in entire good faith, and after careful inquiry of many persons as to the value of the stock and the propriety of the investments. We cannot say that it is shown to our satisfaction that the trustee so far failed to exercise a sound discretion that the investments should be held to be wholly unauthorized. Still, it must have been manifest to any well informed person in the year 1881, that the Union Pacific Railroad ran through a new and comparatively unsettled country; that it had been constructed at great expense, as represented by its stock and bonds, and was heavily indebted; that its continued prosperity depended upon many circumstances which could not be predicted; and that it would be taking a considerable risk to invest any part of a trust fund in the stock of such a road.

In this case the whole trust fund appears, by the first account, to have been \$16,260.05. On May 9, 1881, the trustee bought thirty shares of the stock of the Union Pacific Railroad Company at \$119 per share, which, with commissions, amounted to \$3,573.75. This is an investment of between one fourth and one fifth of the whole trust fund in this stock, and is certainly a large investment relatively to the whole amount of the trust fund to be made in the stock of any one corporation. After this, on August 16, 1881, he purchased twenty shares more at \$123 per share, amounting with commissions to \$2,475. The last investment, we think, cannot be sustained as made in the exercise of a sound discretion. While we recognize the hardship of compelling a trustee to make good out of his own property a loss occasioned by an investment of trust property which he has made in good faith, and upon the advice of persons whom he thinks to be qualified to give advice, we cannot on the evidence hold that the trustee was justified in investing in such stock as this so large a proportional part of the property.

It appears by the report of the single justice before whom the

case was tried, that "the time has now come for a final distribution of said trust fund." It does not appear that, when the first account was allowed, there was any adjudication of the questions now before us, and they are not therefore *res judicata*, and no assent to these investments is shown on the part of the persons now entitled to the trust property. The result is, that this last investment is disallowed, and that the trustee must be charged with the amount of it, to wit: \$2,475, and with simple interest thereon from August 16, 1881, and must be credited with any dividends therefrom which he has received and paid over, with simple interest on each, from the time each dividend was received.

The decree of the Probate Court must be modified in accordance with this opinion.

*Decree accordingly.*¹

¹ Davis, Appellant, 183 Mass. 499, *accord*.

Massachusetts gives trustees more latitude than is given by the great majority of states. All jurisdictions allow investments in certain public securities, and nearly all allow first mortgages on realty. Many allow investments in bonds of private corporations. A few, like Massachusetts, allow investments in corporate stock. And in Massachusetts, contrary to the great weight of authority (*Mattocks v. Moulton*, 84 Me. 545; *Mich. etc. Society v. Corning*, 164 Mich. 395), an unsecured loan is not necessarily improper. *Hunt, Appellant*, 141 Mass. 515.

In the absence of authorization in the trust instrument it is in general not permissible to buy land with the trust fund; but where the trustee forecloses a mortgage it may be permissible to buy in the mortgaged property to save the trust fund. *A fortiori* in the absence of authorization a trustee is not justified in engaging in trade or business with the trust fund. *Trull v. Trull*, 13 Allen (Mass.) 407.

There are very generally statutes and in some states constitutional provisions regulating trust investments in the absence of a controlling intention expressed by the creator of the trust. Not uncommonly the rule is the same as for savings banks. For a summary of the statutes and decisions of the several states, see *Lamar v. Micou*, 112 U. S. 452; *Loring, Trustee's Handbook*, 109-121; *McKinney, Liabilities of Trustees for Investments*; 16 Ann. Cas. 69.

As to the propriety of investments outside the jurisdiction, see *State v. Washburn*, 67 Conn. 187; *Merchants L. & T. Co. v. Northern T. Co.*, 250 Ill. 86; *Thayer v. Dewey*, 185 Mass. 68; *Cornet v. Cornet*, 269 Mo. 298; *McCullough v. McCullough*, 44 N. J. Eq. 313; *Pabst v. Goodrich*, 133 Wis. 43; 14 Ann. Cas. 834; 45 L. R. A. (N. S.) 411.

CANN v. CANN.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1884.

33 W. R. 40.

ADJOURNED SUMMONS. This was an application by the defendants to vary the chief clerk's certificate, whereby a sum of 138*l.* 11*s.* 4*d.* had been disallowed.

The facts were as follows:—The defendants were the surviving trustees and executors of the will and codicil of Samuel Cann, which were dated in 1854 respectively. The said will contained a trust for investment directing the trustees to invest in Parliamentary stock or funds, or on Government or real securities in England and Wales, with the usual power to vary investments; and it was thereby also declared that no trustee should be answerable or accountable for the act or default of any banker or broker or other person with whom any moneys should be deposited for safe custody or otherwise in the execution of the trusts thereinbefore mentioned, or for the deficiency or insufficiency of any security on which any moneys might, in pursuance of the said will, be placed or invested. The trust estate produced an annual income of about 700*l.* In May, 1869, the trustees deposited a sum of 500*l.* belonging to the trust estate, which had been previously invested on a mortgage, at Messrs. Harvey & Hudson's Bank at Norwich, in order that they might look for another mortgage. The money remained on deposit until the 16th of July, 1870, when the bank failed. The said sum of 138*l.* 11*s.* 4*d.* represented the loss thereby occasioned, and the question was whether the trustees were liable to make it good.

KAY, J. It is extremely difficult in these cases to know where to draw the line. Here there is an estate producing 700*l.* a year. A mortgage of 500*l.* is paid off, and the trustees pay that money into a bank for the purpose of getting another mortgage. The question is, whether it was within their powers as trustees to leave that sum in the bank for fourteen months. It seems to me that that was too long. If after six months they could not get a mortgage they ought to have invested in Consols. Without attempting to draw a hard and fast line — for I consider that each of these cases must be judged on its merits — I say that

leaving that money in the bank for fourteen months was leaving it there too long. The moment they began to leave the money there too long they became responsible for all the consequences of their default; and they are therefore liable for the 138*l.* which has been lost. I must dismiss the summons with costs.¹

In re ARGUELLO.

SUPREME COURT, CALIFORNIA. 1893.

97 Cal. 196.

BELCHER, C. This is an appeal by the administrator of the estate of the decedent from an order of the Superior Court of

¹ In the following cases the trustee, having allowed the deposit in the bank to stand for an unusually long time, was charged with the loss occasioned by the failure of the bank: *Moyle v. Moyle*, 2 Russ. & My. 710; *Rehden v. Wesley*, 29 Beav. 213; *Barney v. Saunders*, 16 How. 535; [*Garner v. Hendry*, 95 Iowa 44;] *Woodley v. Holley*, 111 N. C. 380. [See Ann. Cas. 1915C 51.]

If the amount deposited is large, it should be withdrawn without delay and invested. *Astbury v. Beasley*, 17 W. R. 638.

So if a trustee is under a duty to make immediate payment of the trust fund, it is no longer a question of reasonable time. He loans the fund at the bank at his peril. *Darke v. Martyn*, 1 Beav. 525; *Gough v. Etty*, 20 L. T. Rep. 358; *Lunham v. Blundell*, 27 L. J. Ch. 179; *Ricks v. Broyles*, 78 Ga. 610.

But, as is implied in the principal case, a trustee having funds in his hands not immediately applicable to the purposes of the trust, may deposit them for a reasonable time in a bank, taking care to have the credit run to him in his fiduciary capacity. *Atty-Gen. v. Randell*, 21 Vin. Ab. 534; *Rowth v. Howell*, 3 Ves. Jr. 565; *Adams v. Claxton*, 6 Ves. 226; *France v. Woods*, Tam. 172; *Dorchester v. Effingham*, Tam. 279; *Johnson v. Newton*, 11 Hare 160; *Wilks v. Groom*, 3 Drew. 584; *Fenwick v. Clarke*, 4 D. F. & J. 240; *Swinfen v. Swinfen*, 29 Beav. 211; *Re Marcon*, 40 L. J. Ch. 537; *Re Earl*, 39 W. R. 107; *Munnerlyn v. Augusta Bank*, 88 Ga. 333; *Norwood v. Harness*, 98 Ind. 134; [*Officer v. Officer*, 120 Iowa 389; *Re Grammel's Est.*, 120 Mich. 487;] *Jacobus v. Jacobus*, 37 N. J. Eq. 17; *People v. Faulkner*, 107 N. Y. 477, 488; *Ramsey v. McGregor*, 1 Cincin. S. C. 327; *Odd Fellows v. Ferson*, 3 Oh. C. C. 84; *Law's Est.*, 144 Pa. 490. [See Ann. Cas. 1915C 50.]

The deposit may or may not draw interest, but if it is for a fixed time, it becomes an investment upon the credit of the bank; and as such an investment is improper the trustee must make good any loss by reason of the failure of the bank. [*Corcoran v. Kostrometinoff*, 164 Fed. 685, 21 L. R. A. (N. S.) 399;] *Baskin v. Baskin*, 4 Lans. 90; *Frankenfield's App.* 127 Pa. 369*n.*; *Baer's App.*, 127 Pa. 360; *Law's Est.*, 144 Pa. 499 (*semble*). [But see *contra*, *Hunt, Appellant*, 141 Mass. 515.] — AMES.

The trustee is liable if he surrenders control over the deposit, *e.g.* by agree-

San Diego County requiring him to pay to the creditors of the estate whose claims had been duly presented and allowed certain sums of money.

The sum of money in controversy was \$4,846.80, which was received by the administrator for and on account of the estate, between July 5, 1891, and October 15, 1891, and deposited by him in the California Savings Bank, in the city of San Diego, in his own name.

The court below found the facts to be as follows:—

“That at the time said funds were deposited by said administrator in said California Savings Bank, said bank was reputed to be and was considered a safe and solvent bank and place of deposit, and was of good credit and standing, and was believed by said administrator to be solvent and safe; that said deposit was made in the individual name” of the administrator, “without any designation or indication of his representative capacity, but said administrator had no other funds or account with said bank, and deposited such with that particular bank for the express purpose of keeping the same separate from, and so that it would not be unnecessarily mingled with, his own property or individual funds.”

“That in depositing said funds in said California Savings Bank as aforesaid, said administrator acted in good faith.”

“That on the twelfth day of November, 1891, said California Savings Bank became suddenly, unexpectedly, and wholly insolvent, suspended business, and has not been able to pay the amount so deposited by said administrator with it, or any part thereof.”

“That said administrator has been guilty of no negligence or want of care in the administration of said estate, except that he deposited such funds in the California Savings Bank in his individual name, instead of in his representative capacity, or in the name of the estate.”

And as conclusions of law the court found that the administrator was responsible for the money so deposited by him, and that he must pay it over to the creditors of the estate.

The appellant contends that an administrator is only re-

ing that checks must be countersigned by his surety. *Estate of Wood*, 159 Cal. 466, 36 L. R. A. (N. S.) 252; *Fid. & Dep. Co. v. Butler*, 130 Ga. 225, 16 L. R. A. (N. S.) 994.

As to deposits by public officials, see note to *City of Sturgis v. Meade County Bk.*, 38 S. D. 317, *ante*, p. 24.

quired to act in good faith, and to exercise such skill, prudence, and diligence in managing the affairs of the estate as men ordinarily bestow upon their own affairs; and that when he has, in good faith and with reasonable care, deposited funds of the estate in bank, which have been subsequently lost by the failure of the bank, he will not be held liable for the loss, unless he has wilfully and unnecessarily mingled the trust property with his own, so as to constitute himself in appearance its absolute owner; and hence that, under the facts found in this case, the order of the court was erroneous, and should be reversed.

The question presented has many times been before the courts of England and of this country, and the decisions upon it have been practically unanimous, and to the same effect as the decision of the court below in this case.

The law upon the subject is stated in Perry on Trusts, sec. 443: "A trustee may deposit money temporarily in some responsible bank or banking-house; and if he acted in good faith and with discretion, and deposited the money to a trust account, he will not be liable for its loss, . . . but he will be liable for the money in case of a failure of the bank, or for its depreciation, if he deposits it to his *own credit*, and not to the separate account of the trust estate." And again, in sec. 463: "So if the trustee pays the money into a bank in his own name, and not in the name of the trust, he will be responsible for the money in case of the failure of the bank."

A reference to a few of the numerous cases cited will be sufficient.¹ . . .

But whatever may be the rule elsewhere, the appellant insists that the rule in this state is declared in sec. 2236 of the Civil Code, and that that does not make him liable. The section referred to reads as follows:—

"Sec. 2236. A trustee who wilfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events."

We do not think this section was intended to change the rule generally prevailing, or to limit liability under it; on the contrary, the section seems to be in entire accord with the general rule, and in effect to declare it in unmistakable terms.

¹ The learned Chief Commissioner here quoted from *Commonwealth v. McAlister*, 28 Pa. 480, *Williams v. Williams*, 55 Wis. 300, and *Naltner v. Dolan*, 108 Ind. 500.

In our opinion the order appealed from should be affirmed.

VANCLIEF, C., and HAYNES., C., concurred.

For the reasons given in the foregoing opinion, the order appealed from is affirmed.¹

PATERSON, J., GAROUTTE, J., HARRISON, J.

CORNET *v.* CORNET.

SUPREME COURT, MISSOURI. 1916.

269 Mo. 298.

BROWN, C. . . . During the entire time the defendant acted as trustee of this fund he was the senior member of the firm of Cornet & Zeibig, real estate dealers and loan brokers, and the uninvested funds of this estate were deposited in bank in the general checking account of the firm. The undisputed evidence shows that the credit balance of this account was always in excess of the amount of uninvested funds of the estate. During the last five years of the administration the bank paid the firm two per cent interest on its monthly balances. The plaintiff contends that this amounted to a conversion of the trust fund and that the trustee should be charged compound or at least simple interest at the rate of six per cent per annum on these balances. This contention was disallowed, and the court allowed the interest actually received.

This question should be considered in connection with the finding of the referee, in which, after a careful examination of the evidence, we concur, that the trustee used reasonable care to keep the fund invested, and that it had not been used by the firm for its own profit otherwise than by the payment of interest on bank balances as above stated. We do not see how the trust fund lost anything by this practice. We are satisfied that the trustee was not guilty of the wilful violation of the general rule forbidding the mingling of the trust funds with his own. He was, we believe, simply ignorant that such rule existed. The imposition of a penalty on that account would necessarily be purely punitive, and not in any sense compensatory. This would be no less true because the penalty would

¹ Chancellor *v.* Chancellor, 177 Ala. 44; Allen *v.* Leach, 7 Del. Ch. 83, Corya *v.* Corya, 119 Ind. 593; Ames, 484n.; Ann. Cas. 1915C 54. .

A fortiori the trustee must answer for the solvency of the bank where the trust money is blended with the trustee's individual account. Ames, 484n.

inure to the beneficiary. While it would be our duty not only to compel the restoration of anything that might appear to have been lost by this practice but also to protect the beneficiary against possible wrong which might have been concealed by it, yet when punishment alone is involved our discretion should be used to avoid unnecessary hardship. The master was correct in his recommendation in this respect and the action of the court in confirming it is approved.¹ . . .

LOWSON v. COPELAND.

CHANCERY. 1787.

2 Bro. C. C. 156.

ANN BARBER made her will in 1765, and thereby gave the defendant an annuity of three pounds *per annum* for his trouble in receiving several rents of her real estate, and appointed him executor, making no disposition of the residue of her estate. In 1770, the plaintiffs filed their bill as next of kin of the testatrix, insisting that the gift of the annuity had turned the defendant into a trustee for them as to the undisposed surplus, and praying an account of all sums he had received, or might have received. The defendant, by his answer, contested the plaintiffs being next of kin, and put them to the proof of their relationship; and, in case they were such, controverted his being turned into a trustee for them. The cause was heard before his late Honour in 1773, who decreed that the defendant was a trustee for the next of kin, and referred it to the Master to inquire whether the plaintiffs were the next of kin, and to take an account. In 1783 the Master made his report that the plaintiffs were the

¹ St. Paul T. Co. v. Kittson, 62 Minn. 408, *accord*. But see De Jarnette v. De Jarnette, 41 Ala. 708 (mortgage); White v. Sherman, 168 Ill. 589 (stock); Dirks v. Juel, 59 Neb. 353 (bank deposit). •

In Tucker v. New Hampshire T. Co., 69 N. H. 187, it was held that a trust company as trustee might properly deposit trust funds in its savings department and that the *cestui que trust* on the failure of the trust company was not entitled to priority over other depositors in the distribution of the assets of the savings department. So also in *Re People's Trust Co.*, 155 N. Y. Supp. 639, and in *Reid v. Reid* (No. 2), 237 Pa. 176, it was held that a trust company which temporarily deposited in its banking department funds held by it as executor was liable for such interest only as it paid general depositors. But in *Union T. Co. v. Preston Nat. Bk.*, 144 Mich. 106, and in *St. Paul T. Co. v. Kittson*, 62 Minn. 408, the trust company was held for the legal rate of interest.

next of kin; and, among other things, stated a bond, bearing date the 1st of May, 1761, by one Lumley, to the testatrix, for one hundred pounds, with which the Master charged the defendant. To this report the defendant excepted, for that the Master had charged him with the 100*l.* as received from Lumley, whereas he had not received it, although he had made various applications, and used due diligence to obtain payment of it. This exception coming on before the Lords Commissioners, they referred it to the Master to inquire whether the executor had taken proper steps for the recovery of the money, and whether the debt was a good debt, and ordered the defendant to call in the bond. The Master reported, that the defendant had applied by an attorney to the obligor in the bond, to pay the debt, but had brought no action, or made any other application; and that it did not appear whether the debt was or was not recoverable.

It now came on again upon further directions.

Mr. Ambler and *Mr. Scott* (for the defendant) insisted that the report did not charge the defendant with such a neglect as ought to make him personally liable to answer the 100*l.* not got in from the bond debt; that the defendant had made many applications to the obligor; and although he had not brought any action, that arose only from the fear of an useless expense. That the Master had reported it a doubtful debt, and the plaintiffs had never called upon him to bring any action; and he was the rather induced not to do so, as he considered himself as acting upon his own money, having no idea that the annuity of 3*l. per annum* had turned him into a trustee; cases having been determined, that where a legacy is not given in such a way as to exclude the intention of giving the whole, it has been held not to turn the executor into a trustee, which he had been advised was the case with this annuity.

But LORD CHANCELLOR [THURLOW] ordered that he should be liable for this 100*l.* as not having been got in in consequence of his neglect.¹

¹ *Re Greenwood*, 105 L. T. Rep. 509, *accord.* For cases to the same effect see *Ames*, 494*n.* If the trustee shows that the debt could not have been recovered by the exercise of due diligence, or that more was probably to be realized thereon by forbearing to sue than by suing, he is not liable; but the burden of introducing evidence to this effect rests upon the trustee. *Ames*, 494*n.*

So also the trustee will not be liable for compromising with a debtor if he shows that the compromise was reasonable and that it was improbable that the claim could have been collected in full. *Ames*, 494*n.*

ARNOULD *v.* GRINSTEAD.

CHANCERY. 1872.

W. N. (1872) 216.

EDWARD STANLEY, by his will, dated the 15th of January, 1861, directed that "all my personal property invested in government or other securities, in bonds or shares, of whatever nature and kind, be held in the same or the like investments, by and in the name of my wife, Catherine Stanley, my son, R. R. P. Stanley, and G. Burrows, M.D., whom I appoint to be my executrix and executors," upon trusts for the benefit of his daughters and their children.

The personal property of the testator was invested in Victoria Government Bonds, Brazilian and Russian Bonds, Indian and English Railway Stock, East India Stock, and the New 3 per Cents; these investments having been made by the testator himself.

The question was, whether the trustees were justified in retaining the trust funds upon these investments.

Swanston, Q. C., and *W. R. Fisher*, for persons intrusted in remainder, contended that the securities, most of which were payable to bearer, were unauthorized and unsafe (no one being legally responsible for their custody), and that the trustees were bound to convert them into 3 per cents, or show some investment of equal security.

The VICE CHANCELLOR [SIR JAMES BACON] said that the securities on which the trust funds were invested could not be altered without violating the plain and positive direction of the will, and accordingly held that the investments were proper investments, and within the meaning of the will.¹

¹ *Forbes v. Ross*, 2 Bro. C. C. 430, 2 Cox 113 s. c.; *Robinson v. Robinson*, 1 D. M. & G. 247; *Paddon v. Richardson*, 7 D. M. & G. 563; *Consterdine v. Consterdine*, 31 Beav. 330; *Pickard v. Anderson*, 13 Eq. 608, *accord*.

When there is a direction or duty to convert the trust fund into new securities, the conversion must be made within a reasonable time, which, as a rule, means within one year. The trustee was held liable for unreasonable delay in *Bate v. Hooper*, 5 D. M. & G. 338; *Hughes v. Empson*, 22 Beav. 181; *Grayburn v. Clarkson*, 3 Ch. 605; *Sculthorpe v. Tipper*, 13 Eq. 232; *Gainsborough v. Watcombe Co.*, 54 L. J. Ch. 991; *Heirs Hiddingh v. De Villiers*, 12 Ap. Cas. 624. If, however, the condition of the market is such as to justify delay, the trustee who acts in good faith will not be charged, if he does not effect the conversion within a year. *Buxton v. Buxton*, 1 M. & Cr. 80; *Marsden v. Kent*, 5 Ch. Div. 598. — AMES.

If not authorized by the will, the executors or trustees have no authority

MATTER OF LONDON.

SURROGATE'S COURT, NEW YORK. 1918.

104 N. Y. Misc. 372.

COHALAN, S. This is an accounting by testamentary trustees of a trust fund created for the benefit of testator's infant son, Edward Whitney London. The special guardian of the infant son has filed three objections to the said account. Two of the objections relate to the provisions of paragraph 10 of the will of the testator and require a construction thereof. Paragraph 10 reads as follows:

"*Tenth.* All the rest, residue and remainder of my property and estate of every kind, nature and description, real personal and mixed, howsoever and wheresoever the same may be, including all lapsed and ineffectual legacies and bequests, I give, devise and bequeath unto my executors hereinafter named and the survivor of them and unto such of them as shall qualify and act hereunder, in trust nevertheless until my son Edward Whitney London shall attain the age of thirty-five years or shall die, whichever event shall first occur and in the meantime and until the happening of either of those events to invest and reinvest the said rest, residue and remainder of my estate and keep the same invested in such bonds issued by Railroad Corporations in the United States of America as return in interest an income of not less than four per centum per annum at the time of investment with power to vary from time to time all or any part of such investments." . . .

The second objection of the special guardian is "That such trustees should not be credited with the losses, set forth in Schedule B of their account, in transactions in Morris & Essex 3½ % bonds, Illinois Central P. L. 3½ % bonds, Michigan Central 3½ % bonds, New York City 4½ % bonds and United States Liberty Loan first 3½ % bonds, for the reason that such bonds are not of the class permitted by the will."

to continue carrying on a business in which the testator was engaged, except so far as it is necessary to enable them to sell the business as a going concern. *Re Evans*, 34 Ch. D. 597; *Eufaula Nat. Bk. v. Manassas*, 124 Ala. 379; *Campbell v. Faxon*, 73 Kan. 675; *Donnelly v. Alden*, 229 Mass. 109; 40 L. R. A. (N. S.) 201. See *Warren, Cas. Wills*, 589 *et seq.* See *ante*, p. 757.

As to the power to change investments from time to time, see *Jones v. Atchison etc. R. R. Co.*, 150 Mass. 304. See *Trustee Act*, 1893 (56 & 57 Vict. c. 53), sec. 1; *Mass. Stat.*, 1918, c. 68.

The trustees by the 10th paragraph of the will were directed to invest and reinvest the funds of the estate and keep the same invested in "such bonds issued by Railroad Corporations in the United States of America as return in interest an income of not less than four per centum per annum at the time of investment." The account of the trustees shows that the investment in railroad bonds above referred to returned an income of more than four per cent per annum at the time of investment. The special guardian's objection with reference to such investment is therefore overruled. The provision of paragraph 10 of the will directing the trustees to invest the funds of the estate in railroad bonds is mandatory, and the investment by them in New York city bonds above referred to was unauthorized. *Matter of Irwin*, 59 Misc. Rep. 143. I will therefore sustain that part of the second objection of the special guardian which relates to such investment, and the trustees will be surcharged with the loss occasioned thereby.

The remaining undisposed of part of the second objection of the special guardian relates to the investment by the trustees in First Liberty Loan bonds and brings up a most important question for consideration. A strict and literal interpretation of the law, under normal conditions, would require an adjudication that such investment was unauthorized. But these are abnormal times. Our country is engaged in a great war and needs the undivided support, aid and loyalty of every citizen. Under these circumstances the court should not be bound by narrow and restricted rules of law and construction in questions which affect the welfare of our country, but should exercise its best and widest discretion. The investment by the trustees in these Liberty Loan bonds was in aid of our government in its hour of need, and they should be commended rather than condemned therefor. The testator could not have foreseen these conditions when he made his will and inserted his prohibition therein as to the investment of the funds of the estate, and I feel that were he alive he would have invested in these bonds. I will therefore hold that the said investment by the trustees in the First Liberty Loan bonds was justified and will overrule the objection of the special guardian in relation thereto. . . .

*Decreed accordingly.*¹

¹ In extreme cases the court may authorize a form of investment not authorized by the testator. *Curtiss v. Brown*, 29 Ill. 201; *Gavin v. Curtin*, 171 Ill. 640; *Price v. Long*, 87 N. J. Eq. 578. Cf. Pa. Laws, 1917, No. 193,

EDWARDS v. EDWARDS.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1903.

183 Mass. 581.

BILL IN EQUITY, filed March 23, 1903, by the trustees under the will of James Edwards, for instructions as to the application of the proceeds of the sale of a certain valuable tract of vacant land on Huntington Avenue in Boston.

The case came on to be heard before *Braley, J.*, who reserved it upon the bill and answer and an agreed statement of facts for the consideration of the full court, such order to be made therein as justice and equity might require.

KNOWLTON, C. J. This is a bill for instructions by trustees appointed under the will of James Edwards. By the will he gave all his property to these trustees, stating the trust as follows: "To invest and reinvest the same at their discretion, in such securities as the laws of this Commonwealth allow savings banks to invest their funds in, and the whole net income therefrom shall be paid to my said wife as long as she shall live, for her own use and disposal, with the exception that I direct that from said income there shall be paid monthly to my son, William Edwards, and his wife, Alice J. Edwards, in equal shares, the sum of one hundred dollars, as long as my said wife shall live." At the death of his wife the trustees are to pay the income to his children and to the wife of one of them, and at the termination of the trust, to pay over the remainder to his grandchildren or to his heirs at law. The value of the personal property that came into the hands of the trustees was nearly \$70,000, and the value of the real estate was more than \$200,000. Much of the personal property that he left was stock carried by brokers on margins, and the most valuable part of the real estate was unproductive land on Huntington Avenue which was appraised in the executor's inventory, filed November 11, 1896, at \$150,000, and in the trustees' inventory, filed December 31, 1898, at \$155,000, and was sold by the trustees on September 1, 1899, for \$196,500. The question relates to the apportionment of income and principal between the life tenant and the remaindermen, from the proceeds of the sale of the land on Huntington Avenue. In *Johns v. Johns*, 172 Ill. 472, and *Johnson v. Buck*, 220 Ill. 226, the court felt that the circumstances did not demand a departure from the directions of the testator.

ton Avenue. It is agreed that the value of this land at the time of the testator's death was the same at which it was appraised in the executor's inventory, and that the trustees used every reasonable effort to sell it, and in view of the improvements in that vicinity, exercised a sound judgment in holding it until the time of the sale. It did not produce sufficient income to pay the taxes and expenses upon it. Under language like that of this will, which gives the trustees all the property, real and personal, and does not indicate an intention that the time for establishing the fund shall be postponed, and which gives to a life tenant the annual income, it is well settled law in this Commonwealth that the income is to be computed from the time of the testator's death. *Sargent v. Sargent*, 103 Mass. 297, 299. *Westcott v. Nickerson*, 120 Mass. 410. In the present case the testator obviously intended that the entire property should be converted into one fund, and that the unproductive and speculative investments which he had at the time of his death should be changed without unreasonable delay. Much of the property held on margins was not of such a kind "as the laws of this Commonwealth allow savings banks to invest their funds in," and the land on Huntington Avenue was not in a condition to be held as a permanent investment. It was, therefore, the duty of the trustees to convert this property into an income-producing fund, and this they did according to their best judgment and discretion. The testator is presumed to have expected that some time would be required to accomplish this. At the same time, he is presumed to have intended that the rights of the life tenant to income should be ascertained on the creation of the fund, as if the fund had come into existence immediately after his death. This is in accordance with the rule repeatedly stated by this court. *Kinmonth v. Brigham*, 5 Allen, 270, 278. *Sargent v. Sargent*, 103 Mass. 297. *Westcott v. Nickerson*, 120 Mass. 410. *Mudge v. Parker*, 139 Mass. 153. The rule is applicable as well when the delay in converting the property is necessary as when it is caused by the voluntary act of default of the trustees. *Loring v. Massachusetts Horticultural Society*, 171 Mass. 401, 404. In *Westcott v. Nickerson*, *ubi supra*, Chief Justice Gray says of the property in such cases, "The necessary inference and the established rule are that it must be invested as a permanent fund, and the value thereof fixed at the time when the right of the first taker begins, that is to say, at the death of the testator." In *Sargent*

v. Sargent, *ubi supra*, the same justice says, "The general rule is established, that the tenant for life is entitled to the income of a residue given in trust, from the time of the testator's death."

The question raised by this bill for instructions relates only to the proceeds of the sale of the land on Huntington Avenue. The life tenant, the widow of the testator, is one of the trustees who bring the suit, and in the bill she states her claim as follows: "The widow of the testator, who with the annuitants, is entitled to the income of the trust fund from the time of the testator's death to the filing of this bill, claims that she is entitled to receive a proportionate part of the proceeds of the sale of said Huntington Avenue land, as the income of that part of the trust estate, and contends that all the taxes, assessments and brokers' commissions, which the trustees and executors have paid, and are bound to pay, should be charged to the funds received from said sale, and that the fund should then be so divided as to constitute a fund at the time of the testator's death, which, with interest at a reasonable rate, to wit, four per cent, will produce the amount for which the said estate was sold, less the expenses accruing on the same, and all betterments against said premises which the trustees are bound to pay, and that then she is entitled to said interest or income, and that the fund determined as aforesaid shall form a part of the corpus of the estate." The question arises whether, in apportioning the principal and income, we are to assume that the fund, if established at the time of the testator's death, would have earned income at the rate of six per cent per annum, or only at some lower rate. It was said at the argument, and we suppose it to be a fact of common knowledge, that a fund invested in such securities as savings banks may invest in under our laws, cannot be made to produce an income of nearly so much as six per cent per annum, and the life tenant, in stating her claim, suggests the allowance of "interest at a reasonable rate, to wit, four per cent." In this statement she recognizes the principle that in this case we are not to deal with interest as an allowance made by law to represent damages for the failure to pay money when it is due. We are to deal with the income which could have been obtained by the trustees if the fund had been ready for investment and had been invested immediately after the death of the testator. The failure to invest it then was not the fault of anybody, and we are not called upon to allow interest as interest, but only to ascertain the probable income. Whenever

interest is to be allowed for the failure to pay a legacy when it is due, or for any other neglect to pay money, the law knows no other rate than six per cent per annum. *Welch v. Adams*, 152 Mass. 74. *Loring v. Massachusetts Horticultural Society*, 171 Mass. 401. *Bartlett*, petitioner, 163 Mass. 509, 521. But we are to ascertain as between tenant for life and remainderman, what part of a gross sum now in hand shall be treated as capital and what part as income, and when we are called upon to find out what sum at an earlier date, if invested by trustees, would have been sufficient to produce, with its income, the gross sum now in hand, we must look to the actual income that can be obtained from investments, and not to the rate of interest established by law.

In *Westcott v. Nickerson*, *ubi supra*, it is said that the amount obtained "is to be distributed between the tenant for life and the remainderman, by computing what sum, if received at the death of the testator, adding interest at six per cent with annual rests, would produce the amount afterwards actually received . . . and by investing the original sum, so computed, as principal, and distributing the residue as income." In *Kinmonth v. Brigham*, *ubi supra*, a direction is given in similar language. But in neither of these cases was any consideration given to the possible difference between the income actually obtainable and the rate of interest prescribed by law. The first of these cases was decided in 1876, and the other in November, 1862, and at the time to which the decisions relate there was little if any difference between the usual earnings of capital and the rate of interest established by law. Neither the parties nor the court had any occasion to consider the question now raised.

We are of opinion that the case should be referred to a master to ascertain what sum would have been sufficient if invested by the trustees immediately after the death of the testator, to produce, with the income which they reasonably could have obtained from it, the sum in the hands of the trustees as the net proceeds of the land on Huntington Avenue, after deducting their disbursements on account of the property. That sum is to be held as principal and the remainder is to be paid over as income.

*So ordered.*¹

¹ By what is called the rule in *Howe v. Earl of Dartmouth* (7 Ves. 137a), if there is a bequest of one's personal estate or of the residue thereof to be enjoyed by persons in succession, it is the duty of the trustees to convert so much of the property as is of a hazardous or wasting or perishable nature or

MATTER OF STEVENS.

COURT OF APPEALS, NEW YORK. 1907.

187 N. Y. 471.

CULLEN, C. J.¹ The decree of the surrogate, from the affirmance of which by the Appellate Division this appeal is taken, judicially settles the accounts of the executors and trustees of the will of Julia A. Brooks. The controversy relates to the respective rights of life tenants and remaindermen in property, the subject of the trust under the said will. The testatrix created separate trusts for her five grandchildren, exactly alike in character. In each of these trusts she bequeathed to her executors 247 shares of Brooks Locomotive Works in trust, to receive the dividends, issues and profits thereof and apply the same to the use of the grandchild until he became of the age of thirty years, at which time she gave the principal of the trust fund to said child absolutely. In case of the death of the grandchild without issue before arriving at the age of thirty years, then the fund was to go to the testatrix's surviving children and grandchildren. Though the probability is that the appellant Jesse Brooks Nichols will ultimately prove to be the remainderman in this fund, still, on account of the contingency that he may not survive until

which is unproductive (7 Ves. 148), into permanent approved securities. See Ames, 491n. But effect will be given to an intention shown in the will that the property should be enjoyed in specie. See Lewin, Trusts, 332; Gover, Capital and Income, 2 ed., 137-157. It is held in England that the rule in *Howe v. Earl of Dartmouth* does not apply to property settled by deed. *Re Van Straubenzee*, [1901] 2 Ch. 779.

As to the amount of income to which the life beneficiary is entitled, when conversion is delayed, see *Brown v. Gellatly*, L. R. 2 Ch. 751; *Re Earl of Chesterfield's Trusts*, 24 Ch. D. 643; *Re Morley*, [1895] 2 Ch. 738; *Re Wareham*, [1912] 2 Ch. 312; *Equitable T. Co. v. Kent* (Del. Ch., 1917), 101 Atl. 875; *Lawrence v. Littlefield*, 215 N. Y. 561; *Greene v. Greene*, 19 R. I. 619; *Perry, Trusts*, sec. 548n. And see a large collection of cases in 6 Brit. Rul. Cas. 207.

In *Ogden v. Allen*, 225 Mass. 595, where unproductive real estate was sold after the death of the life beneficiary, apportionment was refused.

In *Slade v. Chaine*, [1908] 1 Ch. 522, the trustee applied the trust fund in paying his private debt bearing interest at 5%. He later restored the principal and paid the life beneficiary 5% interest. It was held that the trustee was not under any further liability. See also *Stroud v. Gwyer*, 28 Beav. 130.

¹ The dissenting opinion of Edward T. Bartlett, J., is omitted.

the age of thirty years, the questions involved must be determined on the ordinary principles which prevail between life tenants and remaindermen. The testatrix died November 30th, 1896. Even then the Brooks Locomotive Works was a very successful manufacturing corporation. From the time of the testatrix's death until June 20th, 1901, when the whole plant and properties were sold to the American Locomotive Company, its success was phenomenal. Owing to this fact and to the consolidation of the various interests and companies engaged in the manufacture of locomotives, the Brooks Company, on the sale of its plant and property, received a price several times its estimated value at the time of the decease of the testatrix. It is the distribution of this enhanced value between income and principal of the trust fund which has given rise to the principal questions involved in the present controversy. A majority of the court are of opinion (in which, personally, I do not share) that under the findings of the surrogate and the unanimous affirmance by the Appellate Division, the apportionment made by the surrogate of the funds and properties received by the executor on the dissolution of the Brooks Company cannot be disturbed. We all agree, however, that the principal amount in controversy, a very large sum, received for good will on the sale of the works, cannot be deemed income, but was properly awarded to principal of the trust as an appreciation in the value of the *corpus*. As this court has, within a few years, several times written at length on the general subject, we deem it unnecessary to do more than state our conclusion, and should affirm the decree below without opinion were it not that there is also presented by the appeal a question involving an amount small compared to the large fund which is the subject of these trusts, but which frequently arises in the administration of estates.

The trustees have invested large portions of the fund, which came into their hands on the dissolution of the Brooks Company, in bonds purchased at a premium. The appellant Tyler contended before the surrogate that from the interest collected on those bonds there should be deducted, as it was collected, a sum sufficient to make good at the maturity of the bonds the amount paid as a premium. The surrogate overruled this claim and awarded the whole amount of the interest coupons to the life tenant as income. This disposition was erroneous and is in conflict with the recent decision of this court in *New York Life*

Ins. & Trust Co. v. Baker (165 N. Y. 484). It was there held that where trust funds are invested by the trustee in bonds having a term of years to run and purchased at a premium, such a proportionate deduction should be made from the nominal interest as will, at the maturity of the bonds, make good the premium paid, and thus preserve the principal of the fund intact. It is true that in that case the late chief judge of this court said that the language of the will and the surrounding circumstances might indicate a different intention on the part of the founder of the trusts, in which case the testator's intent would control. Such was the case in *Matter of Hoyt* (160 N. Y. 607), where a testator left as a trust fund for his daughter and only child a comparatively small share of a vast fortune and directed the income to be applied to her use "in the most bounteous and liberal manner." It was held by a divided court that the life tenant should not be charged with any part of the premium paid for the security in which the trust fund was invested. In the earlier case of *McLouth v. Hunt* (154 N. Y. 179) it was held that the life tenant should not be charged with premium on bonds received in kind from the estate of the testator. But as to investments made by the trustees it was said: "There were \$5,000 of the United States bonds purchased by the trustees after the erection of the trusts at the same premium. There may be reasons for charging the life tenants with the premium on these bonds that do not apply to the others. But that item is so insignificant that it does not play any part in the controversy. All questions as to the premiums on these bonds were virtually waived on the argument." While we admit, in accordance with the decision in *Matter of Hoyt*, that the terms of the will may be such as to take a case without the general rule that the principal of the fund must be preserved intact, we think that to justify such an exception to the rule the intent should be expressed in the very clearest manner. If we are to lay down the doctrine that the question is to be determined on the peculiar facts and language of each particular case, no trustee will know how to safely act, and a question constantly arising in the administration of estates will be involved in great confusion and be the cause of great litigation, the latter often at an expense to the estate greater than the sum involved. Such a result would prove very unfortunate.

The justification for the rule is very apparent. The income on a bond having a term of years to run and purchased at a

premium is not the sum paid annually on its interest coupons. The interest on a \$1,000 ten-year five per cent bond, bought at 120 %, is not fifty dollars, but a part thereof only, and the remainder is a return of the principal. All large investors in bonds, such as banks, trust companies and insurance companies, purchase bonds on the basis of the interest the bonds actually return, not the amount they nominally return. Nor is the premium paid on the bond an outlay for the security of the principal. All government bonds have the same security, the faith of the government; yet they vary in price, a variation caused by the difference in the rate of interest and the time they have to run. It is urged that there is often a speculative change in the market value of a bond, and a bond may be worth more at the termination of the trust than at the time of its purchase. This has no bearing on the case. The life tenant should neither be credited with an appreciation nor charged with a loss in the mere market value of the bond. But apart from any speculative change in the market value, there is from lapse of time an inherent and intrinsic change in the value of the security itself as it approaches maturity. It is this, and this only, with which the life tenant is to be charged. We, therefore, adhere to the rule declared in the Baker case, that in the absence of a clear direction in the will to the contrary, where investments are made by the trustee, the principal must be maintained intact from loss by payment of premium on securities having only a definite term to run, while if the bonds are received from the estate of the testator, then the rule in the McLouth case prevails, and the whole interest should be treated as income. These rules may not work perfect justice in all cases, and we fully appreciate that there may be inconsistencies between them, but it is far better that they should be uniformly adhered to, even at the expense of a particular case, than that the administration of estates should be subjected to constant litigation and disputes. It is also to be said that unless the rule in the Baker case is to be observed, the relative rights of life tenant and remainderman would largely depend on the favor or caprice of the trustee who might either buy a bond bearing a high rate of interest at a great premium and impair the principal, or buy a bond bearing a lower rate of interest substantially at par, and preserve the principal intact.

The order of the Appellate Division and the decree of the surrogate of Chautauqua county should be modified in accord-

ance with this opinion, and for that purpose the proceedings remitted to the surrogate to state the account, with costs to both parties payable out of the estate.

HAIGHT, WILLARD BARTLETT and HISCOCK, JJ., concur with CULLEN, Ch. J.; VANN and WERNER, JJ., concur with EDWARD T. BARTLETT, J.

*Ordered accordingly.*¹

MATTER OF OSBORNE.

COURT OF APPEALS, NEW YORK. 1913.

209 N. Y. 450.

CHASE, J. Eugene La Grove died a resident of this state October 4, 1908, leaving a will which was duly probated and by the fourth paragraph of which a trust was created as follows:

"All the rest, residue and remainder of my property and estate, real, personal and mixed of every description and where-soever situated of which I may die seized or possessed . . . I give, devise, and bequeath to my executor and trustee herein-after named in trust, to hold said property and estate and invest and reinvest the same and to collect the rents, issues, income and profits therefrom, and to pay the net rents, issues, income and profits therefrom quarterly to my wife, Ivy Lee La Grove from the time of my death during the term of her natural life, and, upon her death, to divide the principal into as many shares as my wife shall leave children by our marriage her surviving . . . but in the event that my said wife shall die leaving no issue her surviving, then at her death the principal so set apart

¹ *Curtis v. Osborn*, 79 Conn. 555; *New England Trust Co. v. Eaton*, 140 Mass. 532 (three judges dissenting); *Ballantine v. Young*, 74 N. J. Eq. 572; *Re Allis's Estate*, 123 Wis. 223, *accord*. See also *Re Schaefer*, 178 N. Y. App. Div. 117.

Meyer v. Simonsen, 5 De G. & Sm. 723; *American Security & T. Co. v. Payne*, 33 App. D. C. 178; *Hite's Devisees v. Hite's Executor*, 93 Ky. 257; *Penn-Gaskell's Estate* (No. 2), 208 Pa. 346, *contra*.

Even though the bonds are sold before maturity at a premium greater than the premium originally paid by the trustees, it has been held that the remainderman is entitled to the benefit of the amortization fund. *New England Trust Co. v. Eaton*, 140 Mass. 532.

If the testator shows an intention that the life tenant shall receive the full amount of the coupons, that intention will control. *Ballantine v. Young*, 74 N. J. Eq. 572.

For a discussion of this subject, see Edgerton, *Premiums and Discounts in Trust Accounts*, 31 Harv. L. Rev. 447.

for her benefit shall be paid to such person or persons as would be entitled to share in her estate were she to die intestate under the statute of distribution in force at the time of her death in the State of New York."

The testator did not leave any descendants. Ivy Lee La Grove, who was his wife, is living. The rest, residue and remainder of the property, as provided by the fourth paragraph of the will, is held in trust by James W. Osborne as trustee pursuant to the provisions of such paragraph.

The will also provides in the fifth paragraph thereof as follows:

"I hereby request my executor and trustee under this my will not to sell any stocks that I may hold at the time of my death in the Singer Manufacturing Company, unless the remainder of my property and estate is insufficient to pay my just debts and funeral expenses and the specific legacies and charges in this my will contained; and in case such remainder of my estate is insufficient to pay such debts and funeral expenses and the specific legacies in this my Will contained, then and in that event I request my Executor to sell only so much of the stock of said Company as is necessary to be sold in order to pay such debts, legacies and charges. I authorize, however, my Executor and Trustee created under this my Will that should he so elect, he may sell said stock or any of the same and in his discretion change the investment of said trust funds and should my Executor and Trustee elect to sell said stock or any part thereof, that he shall at all times keep the proceeds thereof as well as any other part of the trust funds herein devised or bequeathed invested in stocks and bonds of the United States or of the State of New York and such stocks and bonds or other investments as may be at the time legal investments for trust funds in the State of New York."

The principal part of the estate of the testator consisted of three thousand shares of the stock of the Singer Manufacturing Company, a corporation organized and existing under the laws of the state of New Jersey. The capital stock of the Singer Manufacturing Company at the time of the death of the testator was \$30,000,000. On that day it had a surplus of accumulated earnings arising exclusively from the business of the company amounting to \$37,604,206.

On June 17, 1910, such surplus had increased to \$51,560,757. On March 31, 1910, the executor sold eighty shares of the stock

of said company. On June 2, 1910, the board of directors of said company passed a resolution as follows: "Whereas this corporation now has a capital stock of thirty millions of dollars issued and outstanding and a surplus of thirty millions of dollars and upwards, and, whereas, it is desirable that said surplus to the extent of at least thirty millions of dollars should be retained by the corporation as working capital, and to that end that its capital stock should be increased to sixty millions of dollars and a stock dividend of thirty millions of dollars be declared out of such increase, therefore, be it resolved:

"*First.* That it is advisable to increase the capital stock of this corporation to sixty millions of dollars, and

"*Second.* That it is advisable to declare and pay to the stockholders of the corporation a stock dividend of thirty millions of dollars out of such increase of stock.

"And the board does hereby call a special meeting of the stockholders to be held at the company's office at the Singer Building in the City of Elizabeth on the sixteenth day of June, 1910, at three o'clock in the afternoon, to take action upon the above resolution and decide whether or not such increase of stock shall be made."

On said 16th day of June, 1910, the stockholders adopted a resolution as follows: "*Resolved*, that the directors be and they hereby are authorized and empowered to forthwith declare a stock dividend of thirty millions of dollars, or one hundred per cent on the present issued capital stock of this company, and to issue forthwith in payment thereof certificates of fully paid non-assessable stock, to the stockholders of record at this date, in the amounts in which they are respectively entitled to the same."

On June 17, 1910, the board of directors of said company adopted a further resolution as follows: "*Resolved*, that the directors declare and they do now declare a stock dividend of thirty millions of dollars, or one hundred per cent on the present issued capital stock of this company payable forthwith to the stockholders of record on the 16th day of June instant out of said increase of stock, and that the president and treasurer be and they hereby are authorized and directed to issue forthwith to the several stockholders of record on the said 16th day of June instant, certificates for so many shares of fully paid and non-assessable stock as said shareholders shall severally be entitled to in payment of said dividends."

Thereupon and on the same day, June 17, 1910, said company paid over and delivered to James W. Osborne as such executor a stock dividend of 2,920 shares of the par value of \$100 each, being one share of increased capital stock of said company for each share of old stock theretofore held by said Osborne as executor, and said stock remains in the possession of said Osborne as such executor and trustee.

After the death of La Grove and prior to the payment to Osborne as such executor of the stock dividend, regular cash dividends had been paid on said stock amounting in the aggregate to \$242,564.18, which has been paid from time to time by said executor to said Ivy Lee La Grove, the beneficiary under the trust, as provided by said will.

The troublesome question as to who is entitled to extraordinary dividends declared upon stock held in trust as between life beneficiaries under the trust and the remaindermen, is again presented to us for our consideration.

The question has been considered by the courts in this and other states and countries in many and various forms from time to time since the decisions and opinions of the courts have been published. It has been said that no question before the courts has been more troublesome. Certainly none has resulted in greater contrariety of views. Decisions that are apparently contradictory either in the same court or in the courts of different states and countries have, however, been caused in part by different facts and circumstances existing in the cases decided, and the effect necessarily given to the language of the will or instrument creating the trust in the particular cases in which the decisions have been rendered.

In determining who is entitled to a dividend upon stock held in trust the intention of the testator or the maker of the trust must be carried out when such intent is clear, so far as such intent does not result in an unlawful accumulation of income. Very many cases arise, however, where the testator or maker of the trust had not considered the possibility of enormous dividends being declared by corporations to effectuate their reorganization or in the division of accumulated profits made necessary by new statutes, changed circumstances and modern rules and conditions, or, if such testator or maker of the trust had considered such possibility he failed to express himself in the instrument creating the trust so as to show any clear intention regarding the same.

In England, as far back as 1799, it was established as a rule that all extraordinary or unusual dividends declared during the continuation of a life estate whether payable in cash or in stock belong to the corpus of the fund and not to the income. *Brander v. Brander*, 4 Ves. Jr. 800. The decision in the case cited was repeatedly followed and the rule re-stated. The rule in England as stated in the earlier cases has been materially modified and dividends of cash are now held to belong to the life tenant and stock dividends to the remainderman, subject, perhaps, to an examination of the facts and circumstances in each case in applying the rule as stated. *Bouche v. Sproule*, L. R. 12 App. Cas. 385.

In Massachusetts, in *Minot v. Payne*, reported in 99 Mass. 108, it is said: "A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital." The courts of that state have followed such rule, taking unto themselves, however, the right to determine whether a stock dividend is in effect a distribution of cash to be treated the same as a cash dividend.

In Pennsylvania it was held in *Earp's Appeal*, reported in 28 Penn. St. 368, that ordinary dividends on stock held in trust belong to the person entitled to the income of the trust fund, but that extraordinary dividends should be apportioned between the life estate man and the remainderman in accordance with the amount thereof accumulated before and after the creation of the trust.

The question has been considered by the courts of nearly every state in the Union and by the Federal courts. It would be quite impossible to reconcile the many reported decisions. An effort to determine the weight of authority would be difficult and extend this opinion to unjustifiable length. It is not our purpose, therefore, to analyze or attempt to state the decisions of other jurisdictions or to refer to them except as we have herein to illustrate the extent of the conflict regarding the question now considered.¹ . . .

The extended statement of the principal and most frequently quoted decisions in this state relating to the question involved has seemed necessary because of the difference of opinion expressed by counsel relating thereto. It will be seen that the earlier and also the latest decisions in this state clearly recognize and assert that where extraordinary dividends entrench upon

¹ The learned Chief Judge here discussed the prior New York cases.

the capital of the trust fund they should be returned to such trust fund so far as necessary to preserve the same. Recognizing as we must that a testator or maker of a trust may if he chooses provide that a part of the principal of a trust fund be paid to a life beneficiary of the trust, and that the courts must carry out such intention, all of the decisions in this state can be sustained without violating the right when it is not so controlled by the instrument creating the trust, to have the principal of the trust fund kept unimpaired by the division of accumulated surplus among life beneficiaries.

It is conceded that the capital of a corporation cannot be divided among the life beneficiaries. It is not alone the *capital of the corporation* that should be preserved, but the *capital of the trust fund* whether invested by the trustees in stocks of corporations at a premium, or acquired from the testator or maker of the trust. The surplus of the corporation existing at the formation of the trust or when the stock is purchased represents a part of the capital of the estate as fully as does the capital of the corporation. The division by corporations of their surplus accumulated through a long period of years in very large amounts is now comparatively common, when until within a very recent time such division of enormous amounts was seldom, if ever, made.

Recently a well-known bank in this state with a capital of \$300,000 and a large surplus divided its surplus by declaring an extra dividend of \$2,700,000, or 900 per cent, and increased its capital stock to \$3,000,000, allowing its stockholders to subscribe for the increase and pay for the same by the dividend thus declared.

Another well-known bank in this state with a capital of \$500,000 and a very large surplus divided its surplus by declaring an extra dividend of \$9,500,000, or 1900 per cent, and increased its capital stock to \$10,000,000, allowing its stockholders to subscribe for the increase and to pay for the same by the dividend thus declared. Instances of the declaration of very large extraordinary dividends by corporations within the last few years could be multiplied in great numbers.

We refer to these cases simply to illustrate the great injustice that may be done to the ultimate beneficiaries of a trust fund if a large part of such fund as invested must necessarily by reason of an extraordinary dividend and an arbitrary rule be paid over to the life beneficiaries of the trust. If dividends by a cor-

poration payable out of surplus earnings whenever accumulated must be paid to the life beneficiaries of the trust unless special provision to the contrary is made in the will or instrument creating the trust, it will make the retention or purchase of stocks by a trustee in corporations having a large surplus a matter of questionable propriety. It must also be remembered that if all such dividends are adjudged to constitute income as a matter of law then their retention in the trust even by direction of the testator or maker of the trust would in many instances amount to an unlawful accumulation of income.

We think that in each case the court should look into the facts, circumstances and nature of the transaction and determine the nature of the dividend and the rights of the contending parties according to justice and equity. . . .

It is manifest that any apportionment of a dividend is more or less troublesome in the practical handling of trust estates. It may be necessary in many cases to make the apportionment of dividends in an accounting by the trustee where all the parties interested are bound thereby. The dividends usually declared by corporations are the ordinary dividends such as are declared from year to year or at other regular dividend periods. Extraordinary dividends are the exception. In all cases of ordinary dividends the courts uniformly hold that they should be paid to the life beneficiary of the trust in conformity with the general rule that dividends are deemed to have been earned as of the date of their declaration. In cases of extraordinary and unusual dividends declared in whole or in part from earnings actually accumulated prior to the creation of the trust or the purchase of the stock an adherence to the rule that dividends are deemed to have been earned as of the date of their declaration in many cases shocks the sense of justice.

Notwithstanding the difficulty in many cases of apportioning dividends, it is wiser and better to leave an apportionment to courts of equity, in preference to adhering to a rule that depends more upon its simplicity and convenience of enforcement than upon justice and right. The distinction between ordinary and extraordinary dividends is necessary to make a workable rule and at the same time preserve the integrity of the trust fund. The integrity of the trust fund and rights of the life beneficiary under the trust should each be considered, determined and preserved by a court of equity. As far as the courts in this state have made statements to the contrary, it has been in

opinions where such statements have been unnecessary to the determination of the case then under consideration, and such statements are disapproved. It should be held: 1. Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. 2. Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they entrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund.

It has been argued that the will in this case as quoted shows that the testator intended that the value of the stock of the Singer Manufacturing Company owned by him at his decease should be preserved inviolate and it is also argued that it was not the intent of said corporation as shown by the resolution quoted to distribute the surplus of the corporation but to capitalize it so that thereafter it should be incapable of distribution. It is not necessary to discuss the question so presented in view of the decision that we are making herein.

This case is one that requires an apportionment of the dividend. There is no dispute about the portion thereof that was earned prior to the creation of the trust, and the decree of the surrogate and order of the Appellate Division should be modified so as to award $\frac{13958551}{51580757}$ parts of the stock dividend to the respondent and directing that the remainder thereof be retained as a part of the capital of the trust fund, and as thus modified the order and decree should be affirmed, with costs to the appellant and respondent payable out of the estate.

CULLEN, Ch. J., WILLARD BARTLETT, CUDDEBACK, HOGAN and MILLER, JJ., concur with CHASE, J.; GRAY, J., reads dissenting opinion.¹

Judgment accordingly.

MOTIONS to amend remittitur

1. By the respondent in regard to the method of apportioning extraordinary dividends. . . .

CHASE, J. The proposition decided by us in this case is, that in all cases of extraordinary dividends, either of money or

¹ The dissenting opinion of Gray, J., is omitted.

stock, sufficient of the dividend must be retained in the corpus of the trust to maintain that corpus unimpaired and the remainder thereof must be awarded to the life beneficiary. The method of accomplishing this result is not difficult. The intrinsic value of the trust investment is to be ascertained by dividing the capital and the surplus of the corporation existing at the time of the creation of the trust by the number of shares of the corporation then outstanding, which gives the value of each share, and that amount must be multiplied by the number of shares held in the trust. The value of the investment represented by the original shares after the dividend has been made is ascertained by exactly the same method. The difference between the two shows the impairment of the corpus of the trust. If the dividend is of money the amount of that difference is to be retained by the trustee as capital, and the remainder paid to the life beneficiary. If the dividend is in stock the amount of impairment in money must be divided by the intrinsic value of a share of the new stock, and the quotient gives the number of shares to be retained to make the impairment good — the remaining shares going to the life beneficiary. Market value, good will and like considerations cannot be considered in apportioning a dividend.

The direction that the life beneficiary should be awarded ~~13959551~~
~~51560737~~ parts of the dividend was erroneous, and the number of shares awarded to her must be ascertained in the method hereinbefore described, which will give to the life beneficiary 999.1 shares, and to the corpus of the trust 1,820.9 shares. . . .

The remittitur should be amended as herein provided.

*Ordered accordingly.*¹

¹ By the early English rule all extraordinary dividends, whether cash or stock dividends, were held to be capital. *Brander v. Brander*, 4 Ves. 800; *Paris v. Paris*, 10 Ves. 185. But by the present English rule stock dividends are capital but cash dividends are income. *Bouch v. Sproule*, 12 App. Cas. 385, 29 Ch. D. 635; *Re Alsbury*, 45 Ch. D. 237; *Re Evans*, [1913] 1 Ch. 23; *Re Hatton*, [1917] 1 Ch. 357. Cf. *Re Northage*, 60 L. J. Ch. 488.

As to stock subscription "rights," see *De Koven v. Alsop*, 205 Ill. 309; *Hyde v. Holmes*, 198 Mass. 287, 293; *Baker v. Thompson*, 224 N. Y. 000; *Eisner's Est.*, 175 Pa. 143; *Greene v. Smith*, 17 R. I. 28. Cf. *Holbrook v. Holbrook*, 74 N. H. 201.

As to a distribution of the stock of a subsidiary company, see *Gray v. Hemenway*, 212 Mass. 239; *Smith v. Cotting*, 231 Mass. 42; *United States T. Co. v. Heye*, 224 N. Y. 242; *Matter of Megrue*, 224 N. Y. 284.

As to dividends in liquidation of a corporation, see *Re Armitage*, [1893] 3 Ch. 337; *Second Univ. Church v. Colegrove*, 74 Conn. 79; *Curtis v. Osborn*,

ROBINSON *v.* ROBINSON.

CHANCERY. 1851.

1 De G. M. & G. 247.

LORD CRANWORTH, L. J.¹ . . . In the present case it will be observed the executors had the option of investing the trust money at their discretion on real or government securities, and in such a case Sir J. Leach held, in the case of *Marsh v. Hunter*, 6 Madd. 295, that trustees, by whose default the money is lost, are chargeable, not with the amount of stock which might have been purchased, but only with the principal money lost, and of course, though the report is not so expressed, with interest thereon.

That decision occurred in 1822. Four years later, namely, in 1826, occurred the case of *Hockley v. Bantock*, 1 Russ. 141, before Lord Gifford. There the executors had a similar discretion of investing either on real or government securities; and, on a bill seeking to charge them with balances improperly retained in their hands, Lord Gifford directed an inquiry as to the price of 3l. per cents at the several times when the balances ought to have been invested. Such an inquiry would have been improper if the executors could not have been charged with the value of the stock; and the case, therefore, is an authority that, in the opinion of Lord Gifford, they might be so charged. Notwithstanding this last case, however, Sir J. Leach adhered to his

79 Conn. 555; *Gifford v. Thompson*, 115 Mass. 478; *R. I. Hosp. T. Co. v. Bradley* (R. I. 1918), 103 Atl. 486. But see *Matter of Rogers*, 161 N. Y. 108.

The life tenant has no claim to earnings of a corporation until a dividend has been declared. *Boardman v. Boardman*, 78 Conn. 451; *Tubb v. Fowler*, 118 Tenn. 325.

In general as to apportionment, see Perry, *Trusts*, sec. 556; Warren, *Cas. Wills*, 476.

For a full citation of cases on the rights of the life tenant and remainderman in dividends, see Perry, *Trusts*, secs. 544, 545; 12 L. R. A. (N. S.) 768; 35 L. R. A. (N. S.) 563; 50 L. R. A. (N. S.) 510; L. R. A. 1916D 211; 12 Ann. Cas. 650.

On the question of what is taxable as income, see *Towne v. Eisner*, 244 U. S. 418; *Tax Commissioner v. Putnam*, 227 Mass. 522, L. R. A. 1917F 814. Cf. 29 L. Quar. Rev. 163.

On the general subject of capital and income, see Gover, *Capital and Income*; Howes, *Income and Principal*; Perry, *Trusts*, chap. 18; 26 L. Quar. Rev. 40, 28 *ibid.* 175.

¹ The statement of facts and part of the opinion are omitted.

own view of the law, and acted on it in an unreported case of *Gale v. Pitt* at the Rolls on the 10th of May, 1830.

Lord Gifford's authority had been followed by Lord Langdale in several reported cases, to which we were referred in the argument; namely, *Watts v. Girdlestone*, 6 Beav. 188, *Ames v. Parkinson*, 7 Beav. 379, and *Ouseley v. Anstruther*, 10 Beav. 456.

On the other hand Sir James Wigram, in *Shepherd v. Moulds*, 4 Hare 500, and my learned brother in *Rees v. Williams*, 1 DeG. & S. 314, have refused to follow the authority of *Hockley v. Bantock*, and have acted on the earlier case of *Marsh v. Hunter*. In this irreconcilable conflict of authority, it is absolutely necessary for us to look to the principles on which the doctrine rests.

There can be no doubt but that, where trustees improperly retain balances in their hands, or, by want of due care, cause or permit trust money to be lost, they are chargeable with the sums so retained or lost, and with interest on them at 4l. per cent.

It may also be true that, where trustees have in their hands money which they are bound to secure permanently for the benefit of their *cestuis que trustent*, then, in the absence of express authority or direction to the contrary, they are generally bound to invest the money in the 3l. per cents. This obligation is not the result of any positive law, but has been imposed on trustees by the court as a convenient rule affording security to the *cestuis que trustent*, and presenting no possible difficulty to the trustees.

Suppose, then, that trustees have improperly retained in their hands balances which they ought to have invested in 3l. per cents, either by reason of this general rule of the court, or because such a duty was expressly imposed on them by the terms of the trust, or have by neglect allowed such balances to be lost, what, in such a case, is the right of the *cestuis que trustent*?

In all such cases, or at all events in all such cases where there has been an express trust to invest in 3l. per cents, the *cestuis que trustent* have the option of charging the trustee either with the principal sum retained and interest, or with the amount of 3l. per cents which would have arisen from the investment if properly made. The doctrine of the court where it applies this rule is, that the trustee shall not profit by his own wrong. If he had done what he was bound to do, a certain amount of 3l. per cents would have been forthcoming for the *cestuis que trustent*. And therefore if called on to have such 3l. per cents

forthcoming, he is bound to do so; just as, in ordinary cases, every wrong-doer is bound to put the party injured, so far as the nature of the case allows, in the same situation in which he would have stood if the wrong had not been done. All this is very intelligible.

Again, suppose the trustee has not only improperly retained balances, but has lent or used them in trade. There the *cestui que trust* has the right, if it is for his interest to do so, to charge the trustee not with the sum retained and interest, but with all the profits made in the trade.

The ground on which this right rests is this. The employment in trade is unwarrantable; but if it turns out to have been profitable the *cestui que trust* has a right to follow the money, as it is said, into the trade. In such a case, the trade profits have in fact been produced by the employment of the money of the *cestui que trust*; and it would be manifestly unjust to permit the trustee to rely on his own misconduct in having exposed the funds to the risks of trade, as a reason for retaining the extra profits beyond interest for his own benefit. Even where no such extra profits have been made the *cestui que trust* is in general at liberty to charge his trustee, who has allowed the trust money to be employed in trade, with interest at 5l. per cent, that being the ordinary rate of interest paid on capital in trade. This right depends on principles the same, or nearly the same, as those which enable the *cestui que trust* to adopt the investment, and take the profits actually made.

But the grounds on which, in all these cases, the right of election in the *cestui que trust* rests, wholly fail in a case where a trustee, having an option to invest either in 3l. per cents, or on real security, neglects his duty and carelessly leaves the trust funds in some other state of investment. In such a case, the *cestui que trust* cannot say to the trustee: If you had done your duty I should now have had a certain sum of 3l. per cents, or the trust fund would now consist of a certain amount of 3l. per cents. It is obvious that the trustee might have duly discharged his duty, and yet no such result need have ensued.

Where a man is bound by covenants to do one of two things, and does neither, there in an action by the covenantee, the measure of damage is in general the loss arising by reason of the covenantor having failed to do that which is least, not that which is most beneficial to the covenantee; and the same principle may be applied by analogy to the case of a trustee failing

to invest in either of two modes equally lawful by the terms of the trust.

It was contended at the bar that, in such a case, the trustee has by his neglect lost his right of electing between the two modes of investment; that he was always bound by the trust to exercise his discretion in the mode most beneficial for the objects of the trust; and that, having omitted to do so at the time when the option was open to him, he can no longer do it when he is called to account for his neglect, and when he can no longer exercise an unbiassed and impartial option. The fallacy of this argument consists in assuming that, in the case supposed, the trustee is called on to exercise any option at all. He is not called on to exercise an option retrospectively; but is made responsible for not having exercised it at the proper time, for not having made one of two several kinds of investment. And a reason for this being in such case chargeable only with the money which should have been invested, and not with the 3*l.* per cents which might have been purchased, is, that there never was any right in the *cestui que trust* to compel the purchase of 3*l.* per cents. The trustee is answerable for not having done what he was bound to do, and the measure of his responsibility should be what the *cestui que trust* must have been entitled to, in whatever mode that duty was performed.

The ground on which Lord Langdale proceeded in the several cases before him appears to have been that when the trustee has failed to discharge his duty in either of the ways which were open to him, the *cestuis que trustent* may then exercise an option which certainly did not belong to them by the terms of the trust: i.e., that if the trustee has failed to exercise his option, then the right of election passes to the *cestuis que trustent*, although not given to them by the instrument creating the trust. But on what foundation does this supposed right of the *cestuis que trustent* to exercise such an option rest? No such right can be derived from the principle that the *cestuis que trustent* are entitled to compel the trustee to do what he was bound to do, for he was not bound to purchase 3*l.* per cents. Nor from the principle that they may follow the trust funds into their actual state of investment, or charge a higher rate of interest in consequence of such investment, for the foundation of the complaint is, that the funds have not been invested at all. The only plausible foundation for the doctrine which occurs to us is this: The trustee was bound to exercise his option not capriciously,

but in the mode likely to be most beneficial to the *cestuis que trustent*. And their interests appear in the result to be best served by requiring an investment in 3l. per cents. But this reasoning seems founded on a fallacy. The selection of the 3l. per cents is thus made to depend not on any option in their favor which the trustee was originally bound to exercise; but on the accident of their subsequent rise in value, a principle of decision from which, with all deference, we differ. If such a principle were to be applied, then, as it was well put at the bar, if in the present case there had been a discretion to invest in railway shares, the *cestuis que trustent* might perhaps now fix on the shares of some particular railway which have risen very highly in value, and say the investment might have been and so ought to have been, on that particular security.

On the whole, therefore, we cannot discover any such right of option as is contended for in the *cestuis que trustent*, not on the ground of their being entitled by the terms of the trust to compel the trustee to make an investment in 3l. per cents, for no such obligation was imposed on him; not on the ground of their being entitled to adopt or insist on any actual investment, for no investment was made; not on the ground of any obligation on the part of the trustees to select the 3l. per cents as the most beneficial mode of investment, for the advantage of the 3l. per cents arises from their accidental and subsequent rise in value, and not from any necessary superiority at the time when the investment ought to have been made.¹ . . .

¹ See *Knott v. Cottey*, 16 Beav. 77. See also 34 L. Quar. Rev. 168.

If the trustee should have invested in particular securities which rise in value he is accountable for the appreciation. *Bate v. Hooper*, 5 DeG. M. & G. 338; *Byrchall v. Bradford*, 6 Madd. 235; *Pride v. Fooks*, 2 Beav. 430; *Re Lasak*, 20 N. Y. Supp. 74.

If a trustee improperly sells the trust securities, and they rise in value he is accountable for the appreciation. See *Piety v. Stace*, 4 Ves. 620, 622.

A wrongful retention of improper securities makes the trustee liable for principal and interest if the securities fall in value. *Villard v. Villard*, 219 N. Y. 482.

Interest. A trustee who improperly fails to invest the trust fund or improperly invests or converts it, may be charged with the amount of the trust fund and interest. *Mades v. Miller*, 2 App. D. C., 455; *Dunscomb v. Dunscomb*, 1 Johns Ch. (N. Y.) 508. In England the courts have made a distinction between negligence and misconduct, imposing a greater rate of interest in the former case. In this country, however, in most of the states, no such distinction is made, but the trustee is charged with the legal rate of interest. *Ames* 496n. But see *Backes v. Crane*, 87 N. J. Eq. 229.

The usual rule is that the trustee is charged with simple and not compound

interest, even though he has converted the trust fund and has mingled it with his own funds. *Forbes v. Ware*, 172 Mass. 306; Ames 498n. But see Cal. Civ. Code, sec. 2262; Mont. Civ. Code, sec. 3014; N. Dak. Comp. L., 1913, sec. 6304; S. Dak. Civ. Code, sec. 1640. If however the trustee has used the trust fund in trade, he is usually charged with compound interest, not, according to the modern view, as a punishment for his misconduct but because of the presumption that he has made as much as compound interest. "In some cases it is said that compound interest is imposed as a penalty, but the more correct view seems to be that it is imposed because in the particular case it has been received, or is presumed to have been received, or ought to have been received, or the circumstances were such that the court was unable to determine whether the person charged had or had not received it, and compelled him to account for it in order to make sure that the *cestuis que trust* received all to which they were entitled." *Forbes v. Ware*, 172 Mass. 306, 309. See also *Bobb v. Bobb*, 89 Mo. 411; Ames 498n. Compound interest is also charged against a trustee who fails to comply with a direction to accumulate the interest on the trust fund. See Ames 498n. See also 29 L. R. A. 622.

Profits. If a trustee has in fact made a profit by the use of the trust fund he will be compelled to hold that profit for the *cestui que trust*. *Boston etc. Co. v. Reed*, 23 Colo. 523; *Thompson v. Knapp*, 223 Mass. 277. See Chap. IV, sec. VI, *ante*.

CHAPTER X.

THE TERMINATION OF A TRUST.

AYLSWORTH *v.* WHITCOMB.

SUPREME COURT, RHODE ISLAND. 1879.

12 R. I. 298.

BILL IN EQUITY to terminate a voluntary trust created by the complainant for his own benefit and to obtain a reconveyance of the trust property.

POTTER, J. By deed of trust dated July 31, 1875, the complainant, then just twenty-one years of age, conveyed certain real estate and any balance of personal estate he might have to the respondent, his former guardian, to hold to him his heirs and successors in the trust — in trust to take possession and manage, &c., and once in six months to pay over the income to the complainant or his order, and for his use during life, and on his decease to convey the same to such persons as by will he should appoint, "and in default of such will to my heirs at law, according to the statutes of descent then in force."

The complainant alleges that he made the deed at the urgency of his friends, who expressed a fear that he might waste his property; that he executed it under the impression that it was a temporary provision, and that he could revoke it, and that the trustee also acted upon the same understanding; and the prayer of the bill is that a reconveyance may be ordered. The trustee has answered, admitting that the deed was executed on the belief and understanding by both parties that it was revocable. It further appears that there is no personal estate remaining, and that the real estate was at the date of the deed, and is now, subject to mortgage.

This settlement was a voluntary one without any consideration. It is true the instrument contains no power of revocation, but according to the weight of modern authority, this is only

a circumstance to be taken into account and is not decisive, and where a deliberate intent to make it irrevocable does not appear, the absence of the power will be *prima facie* evidence of mistake. . . .

*Decree ordering reconveyance.*¹

In re SELOUS.

THOMSON v. SELOUS.

HIGH COURT OF JUSTICE, CHANCERY DIVISION. 1901.

[1901] 1 Ch. 921.

ORIGINATING SUMMONS. A testator who died on September 24, 1890, bequeathed a leasehold messuage to a trustee in trust for two of his daughters in equal shares as tenants in common. By an indenture dated June 24, 1895, and made between the trustee of the one part and the daughters of the other part, after reciting the above bequest and reciting that the daughters had requested the trustee to execute such assignment to them of the said messuage as was thereafter expressed, it was witnessed that the trustee, at the request and by the direction of the daughters, assigned the messuage to the daughters to hold the same unto the daughters as joint tenants for the residue of the lease, the daughters entering into a joint covenant with the trustee to pay the rent and perform the covenants of the lease, and to indemnify the trustee against all claims on account of the same.

¹ As a general rule a trust once completely and validly created, whether by a simple declaration of trust or by a transfer in trust, cannot be revoked by the settlor unless he has reserved a power of revocation. Ames, 233n.; Perry, Trusts, sec. 104.

By the weight of authority the absence of a clause reserving a power of revocation raises no presumption that it was omitted by mistake. Sands v. Old Colony T. Co., 195 Mass. 575.

As to the effect of the failure to give the beneficiary notice of the trust, see *ante*, Chap. II, sec. IV.

In England an assignment for the benefit of creditors is revocable until assented to by one or more of the creditors. *Granard v. Lauderdale*, 3 Sim. 1; *Johns v. James*, 8 Ch. D. 744; *Ellis & Co. v. Cross*, [1915] 2 K. B. 654. By the weight of authority the rule is otherwise in the United States. *Burrill, Assignments*, 6 ed., chap. 27; Perry, Trusts, sec. 593.

One of the daughters having died on September 15, 1900, this summons was issued to determine (*inter alia*) whether an equitable moiety of the leasehold messuage belonged to her estate, or whether the entirety belonged to the surviving daughter.

Jason Smith, for the deceased daughter's executors. The assignment of June 24, 1895, only created a joint tenancy of the legal estate, the daughters holding that estate in trust for themselves as tenants in common. The equitable estate did not merge in the legal estate, as these estates were not coextensive, or commensurate, or of the same quality.

It is a common practice to convey freeholds and leaseholds to partners as joint tenants in trust for themselves as part of their co-partnership estate: 1 Key and Elphinstone's Conveyancing, 6th ed. 405; and it has never been suggested that they become joint tenants in equity. We are therefore entitled to the equitable interest in one moiety of the messuage.

T. T. Methold, for the surviving daughter. Where equitable and legal estates, equal and coextensive, unite in the same person, the former merges: *Selby v. Alston*, 3 Ves. 339; *Lee v. Lee*, 4 Ch. D. 175; *In re Douglas*, 28 Ch. D. 327. The same rule must apply where they unite in two persons, and for the purpose of merger a tenancy in common must be treated as equal and coextensive with a joint tenancy. The surviving daughter is, therefore, entitled to the entirety.

Rayner Goddard and Bovill, for other parties to the summons.

FARWELL, J. In my opinion the assignment of June 24, 1895, created a joint tenancy in law and equity. It has been contended that it only created a joint tenancy of the legal estate, and that the equitable tenancy in common remained unaffected, the daughters merely holding the legal estate as joint tenants in trust for themselves as tenants in common. But I do not think that is the true view. The rule in *Selby v. Alston*, namely, that where equitable and legal estates, equal and coextensive, unite in the same person, the former merges, or, in other words, that a person cannot be trustee for himself, applies to a case where such estates unite in two or more persons. The only doubt I felt was whether the advantage of a tenancy in common over a joint tenancy raised any presumption against merger. But the difference in interest between these two estates is so small and shadowy that I do not think it would be sufficient to raise that presumption. I hold that two or more

persons cannot be trustees for themselves for an estate co-extensive with their legal estate.¹

¹ Connolly v. Connolly, 1 I. R. Eq. 376 (holding that where one of two equitable joint tenants becomes trustee, the joint tenancy is severed). See Cooper v. Cooper, 5 N. J. Eq. 9; Greene v. Greene, 125 N. Y. 506. But see Harris v. Harris, 205 Pa. 460 (holding that where property was given to four persons upon trust for the four until all should agree upon a division of the property, the trust could only be ended by the consent of all four).

A trust is terminated when the sole beneficiary has the legal title. Langley v. Conlan, 212 Mass. 135; Kronson v. Lipschitz, 68 N. J. Eq. 367; Ann. Cas. 1918A 481. This happens where the trustee surrenders the legal title to the *cestui que trust* (Miller v. Simonton, 5 S. C. 20); or where the *cestui que trust* releases to the trustee (Newman v. Newman, 28 Ch. D. 674, *ante*, p. 725; Owings v. Owings, 3 Ind. 142; Ormsby v. Dumesnil, 91 Ky. 601); or where the trustee and *cestui que trust* convey to a third person. Parker v. Converse, 5 Gray (Mass.) 336.

But if one of several beneficiaries becomes the legal owner, there will be no merger. Burbach v. Burbach, 217 Ill. 547; Miller v. Rosenberger, 144 Mo. 292. But see Wills v. Cooper, 25 N. J. L. 137 (interest subject to execution). So if a beneficiary for life becomes legal owner there will be no merger. Spengler v. Kuhn, 212 Ill. 186. See Losey v. Stanley, 147 N. Y. 560. But see Weeks v. Frankel, 197 N. Y. 304.

If the beneficiary becomes one of several trustees, there will be no merger. See Story v. Palmer, 46 N. J. Eq. 1 (note); Robertson v. de Brulatour, 188 N. Y. 301; Ann. Cas. 1918A 481.

If a testator devises land to his wife in trust for their son, and dies, and the wife later dies intestate, leaving the son as her sole heir, the trust is extinguished; and if the son later dies intestate his heirs *ex parte materna* are entitled to the land both legally and beneficially. Goodright v. Wells, 2 Doug. 771; Doe v. Putt, 2 Doug. 773 (cited); Wade v. Paget, 1 Bro. C. C. 363, 1 Cox 74 s. c.; Selby v. Alston, 3 Ves. 339; Langley v. Sneyd, 1 S. & S. 45; Creagh v. Blood, 3 Jon. & Lat. 133; Re Douglas, 28 Ch. D. 327; Nicholson v. Halsey, 1 John. Ch. (N. Y.) 417; Shepard v. Taylor, 15 R. I. 204; Ames, 448n.; 3 Preston, Conveyancing, 3 ed., 328-341.

If the legal interest and the equitable interest in land become united in the same person, his widow is entitled to dower. Hopkinson v. Dumas, 42 N. H. 296.

As to the effect of the destruction of the trust *res* by merger, see *ante*, Chap. VII.

As to the effect of escheat on the death of the trustee without heirs, see *ante*, Chap. VII. As to the effect of the death of the *cestui que trust* without heirs, see *ante*, Chap. VI.

As to the effect of the operation of the Statute of Uses when the purpose of a trust has been accomplished, see Hooper v. Felgner, 80 Md. 262, *ante*, p. 5.

BROOKS *v.* DAVIS.

CHANCERY, NEW JERSEY. 1913.

82 N. J. Eq. 118.

FINAL hearing on bill to terminate a trust under a will.

LEAMING, V. C. The bill discloses that the will of Lenora Flowers directs that her real and personal estate be held in trust by her executor, defendant herein, during the lifetime of Aaron Kraft, grandson of testatrix; that the executor is directed to pay to the grandson \$4 per week, during his lifetime, from the income of the property, and to pay to him the entire net income of the property during his lifetime in the event of the decease of his wife; that at his death the entire trust estate is to go to certain designated devisees; that since the decease of testatrix complainant has purchased from the life *cestui que trust* his rights under the will, and has also purchased from the several devisees their several rights, and by virtue of such purchases is now the sole and only person interested in the estate. The bill prays that the trust may be terminated and that an accounting may be had and the entire estate turned over to complainant.

A demurrer has been filed by defendant, and in support of the demurrer, it is claimed that the equitable life estate of Aaron Kraft is not assignable and that this court is without jurisdiction. . . .

It is urged in behalf of demurrant that the provision of the will above quoted creates a spendthrift trust in behalf of Aaron Kraft, and that his rights under such a trust are inalienable.

It is clearly unnecessary to here determine whether, or to what extent, in this state a testator may lawfully exempt an equitable life estate created by his will from voluntary or involuntary alienation by the *cestui que trust*. In *Camden Safe Deposit and Trust Co. v. Schellinger*, 78 N. J. Eq. (8 Buch.) 138, I had occasion to refer to the conflict between what is known as the English rule and the rule which has been adopted by some of the American states, and to suggest that our court of last resort has not, so far as I am aware, been called upon to determine the rule that controls in this state. . . .

But should the most liberal views in support of the right of restraint against alienation be here adopted it is apparent that

the terms of the will annexed to the bill in this case are inadequate to accomplish that result. An examination of the authorities collected in the above citations will disclose that the view is adopted with entire uniformity that to create a restraint against alienation it must clearly appear that such was the intention of the testator or donor. Cases are to be found to the effect that a provision exempting the gift from claims of creditors of the donee or a provision that the gift was for the support of the donee may include by implication a provision against voluntary alienation, but it will be observed that in the will here in question no provision in any way suggests a purpose on the part of testator to restrict the donee's powers over the gift, unless the direction for small weekly payments may be held to indicate that purpose. I think it clear, however, that that circumstance cannot properly be held to justify a provision against alienation to be read into the will.

In the absence of an express or implied provision against alienation the assignment from Aaron Kraft to complainant must, under the averments of the bill, be sustained.

The entire estate having at this time become vested in complainant, there can be no doubt of the jurisdiction of this court to grant the relief sought. *Huber v. Donoghue*, 49 N. J. Eq. (4 Dick.) 125.

I will advise a decree overruling the demurrer.¹

¹ See *Tilton v. Davidson*, 98 Me. 55; *Brillhart v. Mish*, 99 Md. 447; *Whall v. Converse*, 146 Mass. 345; *Sears v. Choate*, 146 Mass. 395; *Simmons v. Northwestern T. Co.*, 136 Minn. 357; *Donaldson v. Allen*, 182 Mo. 626; *McKiernan v. McKiernan* (N. J. Eq. 1909), 74 Atl. 289; *Stafford's Est.*, 258 Pa. 595; *Ann. Cas.* 1915B 723.

The trust will not be continued merely for the benefit of the trustee. *Eakle v. Ingram*, 142 Cal. 15; *Fox v. Fox*, 250 Ill. 384; *Slater v. Hurlbut*, 146 Mass. 308; *Robbins v. Smith*, 72 Oh. St. 1, 19 (*semble*); *Armistead v. Hartt*, 97 Va. 316.

After the lapse of a long interval of time after the fulfillment of the purposes of the trust, a conveyance by the trustee to the *cestui que trust* may be presumed. *Miller v. Cramer*, 48 S. C. 282; *Blake v. O'Neal*, 63 W. Va. 483, 494. Compare the English cases of satisfied attendant terms, *e.g.*, *Goodtitle v. Jones*, 7 T. R. 45.

GOODSON v. ELLISSON.

CHANCERY. 1827.

3 Russ. 583.

ELDON, L. C. In 1767 a deed was executed, and I will assume that a fine was properly levied in pursuance of it, by which an estate was granted and conveyed to Richard Ellisson and his heirs on certain trusts. The bill deduces the various changes of the title to the equitable interest, which occurred between 1767, and November, 1822, bringing it, in 1819, into eight different persons, each of whom is represented as the owner of an undivided eighth part of the property. These eight persons sell the property in different lots to different persons; and, the present plaintiff having bought one of the lots, a deed is prepared, conveying certain parcels of land to him; that deed the eight persons who are represented as the owners of the beneficial interest have executed; and the co-heiresses of Richard Ellisson are also required to execute it. They refuse, and the bill is filed. . . .

The Master of the Rolls has ordered the defendants to execute the conveyance, and to pay the costs of the suit.

Now, even if the plaintiff had been the purchaser of the whole estate, and the conveyance had related to the whole, it would have been a matter for consideration, whether the trustees would not have a right, where there has been so much devolution of title, to have the title examined in this court; instead of being required to acquiesce in an opinion which was not clothed with the sanction of judicial authority. But this plaintiff is the purchaser of only sixteen acres of the property, and the rest of the estate has been sold to other persons in different lots! Now, I confess it is quite new to me to be informed that you can call on a trustee from time to time to divest himself of different parcels of the trust estate, so as to involve himself as a party to conveyances to twenty different persons. Has not a trustee a right to say, "If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper?" I have been accustomed to think that a trustee has a right to be delivered from his trusts, if the *cestuis que trust* call for a conveyance.

Another principle which has been lost sight of in this decree is, that a trustee can be called on to convey only by the words

and descriptions by which the conveyance was made to him. In this respect he is like a mortgagee.

I see nothing in the record which would have hindered me from directing these ladies to convey, if I had such parties before me as would have enabled me to direct a conveyance of the whole estate. If the *cestuis que trust* had all been here, they might have prayed that the sixteen acres in question might be conveyed to Goodson, and the residue of the estate to a trustee on trust to convey to the other purchasers. As the suit is framed, I cannot take that course. . . .

The following decree was made: "His Lordship doth order that the decree made in this cause, the 18th of August, 1824, be reversed; and it is ordered that it be referred to the Master to inquire and state to the court whether the plaintiff is entitled to that beneficial equitable estate which he seeks to have clothed with a legal estate by conveyance; and in making the said inquiry it is ordered that the Master do ascertain and state to the court whether all prior vested and contingent equitable titles have failed by deaths or non-existence of persons who would have taken before the plaintiff, &c. And it is ordered that the said Master do tax the costs of the defendants of this suit to this time, including their costs of the appeal, as between party and party, that the same, when taxed, be paid by the plaintiff to the defendants; but this taxation is to be without prejudice as to whether the defendants shall not be finally entitled to any further costs, charges, and expenses; and his Lordship doth reserve the consideration of all further directions, and whether the defendants shall be allowed any further costs, charges, and expenses up to this time, and also the consideration of all subsequent costs, charges, and expenses, until after the Master shall have made his report."

WELCH v. EPISCOPAL THEOLOGICAL SCHOOL.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1905.

189 Mass. 108.

MORTON, J. This is a petition by the plaintiffs as trustees under the will and codicil of Benjamin T. Reed praying that the trust may be terminated as to two thirds of the property held by them in trust, and that they may be authorized and directed to convey the same to the Trustees of the Episcopal Theological

School who are the ultimate beneficiaries of the whole of the trust property. The said Benjamin T. Reed left a widow, and a son who was his sole heir and next of kin. By a codicil to his will he gave the rest and residue of his estate to trustees in trust first to make up out of the income any deficiency of income from property given in trust for his wife if the same did not amount to \$15,000 in any one year, and then to divide the rest of the income into three equal shares, one to be paid to his wife for life, one to the son or the son's wife for life and the other to the theological school. On the decease of the testator's wife two thirds of the income were to be paid to the school and the other third was to be paid to the son and his wife or the survivor of them during their lives. On the decease of the son and his wife leaving children of the son the trustees were to convey one third of the principal to such children, and if the testator's wife should then have deceased, the other two thirds to the school. If the son and his wife should decease leaving no children of the son, and the testator's wife should also have deceased, then the trustees were to convey the residue to the school. At the time of the testator's death the son was married. His wife afterwards died and he married the defendant Martha S. Reed and died without children. A question arose as to whether the present Mrs. Reed was entitled under the codicil as the wife or widow of the son. An agreement of compromise was entered into between the widow of the son and the school in which the school recognized and conceded that she was entitled to the rights of the widow of the son for her life, and she agreed that on the death of the testator's widow the principal of the trust fund should be divided into three equal parts two of which should be conveyed to the school and the other should continue to be held in trust for her benefit for life and then go to the school. The testator's widow has now deceased and the son's widow and the school and the trustees are all desirous that the trust should be terminated as to the two thirds and the agreement between the son's widow and the school carried out as therein provided.

There is no doubt about the power of this court to terminate a trust in a proper case. *Williams v. Thacher*, 186 Mass. 293. *Matthews v. Thompson*, 186 Mass. 14. *Sears v. Choate*, 146 Mass. 395. There is also no doubt that a trust may be terminated as to certain property and continued as to other property. *Williams v. Thacher*, 186 Mass. 293, 300. *Inches v. Hill*, 106

Mass. 575. All that the trustees are required to do in the present case is to hold the property and pay over the income. They are not required to exercise an active discretion as in *Danahy v. Noonan*, 176 Mass. 467. The scheme of the trust is very different from that in *Young v. Snow*, 167 Mass. 287, and does not contemplate, as that did, the accumulation of income by the trustees and the expenditure by them of so much of it as might be necessary to keep the estate in repair. The case also differs from *Claffin v. Claffin*, 149 Mass. 19, and *Hoffman v. New England Trust Co.*, 187 Mass. 205. The school is the equitable owner of the whole trust estate. It is entitled to the present income of two thirds of it. The postponement by the testator of the conveyance to it was for the benefit of his wife and his son's wife. The testator's wife is dead and the son's wife agrees to the conveyance. All parties in interest agree to and desire the termination of the trust as to the two thirds of which the school is entitled to the present income and we see no valid objection to it. The questions raised and the doubts suggested by the guardian *ad litem* as to the possibility of reverter in the heirs of the testator in case the corporation of the trustees of the theological school should be dissolved do not seem to us sufficient to warrant us in denying the prayer of the petition.

*Decree for the petitioners.*¹

¹ Where there are several *cestuis que trust*, the court will not usually order a partition or otherwise terminate a trust, wholly or partially, except in accordance with the terms of the trust, unless all the *cestuis que trust* are *sui juris* and consent. *Taylor v. Grange*, 13 Ch. D. 223, 15 Ch. D. 165; *Biggs v. Peacock*, 20 Ch. D. 200, 22 Ch. D. 284; *Re Tweedie*, 27 Ch. D. 315; *Re Horsnail*, [1909] 1 Ch. 631; *Anderson v. Williams*, 262 Ill. 308; *Olsen v. Youngerman*, 136 Iowa 404; *Kimball v. Blanchard*, 101 Me. 383; *Wirth v. Wirth*, 183 Mass. 527; *Hoffman v. N. E. Trust Co.*, 187 Mass. 205; *Zabriskie's Ex'ors v. Wetmore*, 26 N. J. Eq. 18; *Story v. Palmer*, 46 N. J. Eq. 1; *Hill v. Hill*, 49 Okla. 424; *Robbins v. Smith*, 72 Oh. St. 1; *Hutchinson's App.*, 82 Pa. 509; *Twining v. Girard etc. T. Co.*, 14 Phila. (Pa.) 74; *Richardson's Est.*, 16 Phila. 326. See Ann. Cas. 1912C 327.

But if the court is of opinion that the interests of the objecting *cestuis que trust*, or those laboring under a disability are not prejudiced thereby, a partial termination of the trust may be decreed. *Harbin v. Masterman*, [1896] 1 Ch. 351; *Wayman v. Follansbee*, 253 Ill. 602; *Henderson's Est.*, 15 Phila. 598.

An equitable tenant for life cannot insist upon a conveyance by the trustees to him of a legal life estate. *Russell v. Grinnell*, 105 Mass. 425; *Cooper v. Cooper*, 36 N. J. Eq. 121; *Moss's Est.*, 15 Phila. 512. But an equitable tenant in tail may insist upon a conveyance to him of a legal estate tail. *Saunders v. Nevil*, 2 Vern. 428.

SAUNDERS *v.* VAUTIER.

CHANCERY. 1841.

4 Beav. 115.¹

THE testator, Richard Wright, by his will, "gave and bequeathed to his executors and trustees thereafter named all the East India stock which should be standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue due thereon, until Daniel Wright Vautier should attain his age of twenty-five years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said Daniel Wright Vautier, his executors, administrators, and assigns, absolutely." And the testator devised and bequeathed his residuary real and personal estate to the persons in his will named.

The sum of 2,000*l.* East India stock was standing in the testator's name, at his death, in 1832. A suit was afterwards instituted for the administration of the testator's estate; and Daniel Wright Vautier being an infant, a reference in the cause was made to the Master, to approve of a sum to be allowed for his maintenance. The Master reported his fortune to consist of the East India stock in question, and reported that 100*l.* a year ought to be allowed for his maintenance out of the dividends thereof.

Sir C. C. Pepys, who was then Master of the Rolls, by an order dated the 25th of July, 1835, confirmed the report, and ordered the payment of 100*l.* a year out of the dividends of the East India stock, for the maintenance of the infant, Daniel Wright Vautier.

Daniel Wright Vautier attained twenty-one in March, 1841, and presented a petition to have a transfer of the fund to him.

Mr. Pemberton argued that the petitioner had a vested interest, and that as the accumulation and postponement of payment was for his benefit alone, he might waive it and call for an immediate transfer of the fund. *Josselyn v. Josselyn*, 9 Sim. 63.

THE MASTER OF THE ROLLS [LORD LANGDALE]. I think that principle has been repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where

¹ Cr. & Ph. 240, s. c.

the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.

Mr. Kindersley, for the residuary legatees, most of whom are infants, was proceeding to argue that the petitioner did not take a vested interest until he attained twenty-five, but the Master of the Rolls observed that the contrary must have been decided or assumed when the order for maintenance had been made by the present Lord Chancellor. He did not, at present, see any reason to doubt the propriety of that order, but the argument must assume it to be erroneous, and call upon him to decide in a different manner, and he thought that it would be inconvenient to argue again, in this court, a point on which the judge of the court of rehearing had, probably, already expressed an opinion.

The cause stood over, with liberty to apply to the Lord Chancellor, when the Lord Chancellor held the legacy vested, and ordered the transfer.¹

¹ *Josselyn v. Josselyn*, 9 Sim. 63; *Jackson v. Marjoribanks*, 12 Sim. 93; *Curtis v. Lukin*, 5 Beav. 147, 155, 156 (*semble*); *Rocke v. Rocke*, 9 Beav. 66; *Coventry v. Coventry*, 2 Dr. & Sm. 470; *Re Jacob's Will*, 29 Beav. 402; *Tatham v. Vernon*, 29 Beav. 604, 617; *Buttanshaw v. Martin*, Johns. 89; *Gosling v. Gosling*, Johns. 265; *Magrath v. Morehead*, L. R. 12 Eq. 491; *Hilton v. Hilton*, 14 Eq. 468, 475; *Croxton v. May*, 9 Ch. D. 388 (*semble*); *Nixon v. Cameron*, 26 Ch. Div. 19; *Re Tweedie*, 27 Ch. D. 315; *Harbin v. Masterman*, [1894] 2 Ch. 184 [aff'd *sub. nom.* *Wharton v. Masterman*, [1895] A. C. 186 (accumulation for charity);] *In re Johnston*, [1894] 3 Ch. 204; *Miller v. Miller* (Court of Session, 1890), 18 R. 301; *Cuthbert* (Court of Session, 1894), 31 Sc. L. Rep. 575; *Woolley v. Preston*, 82 Ky. 415; [*Rector v. Dalby*, 98 Mo. App. 189;] *Huber v. Donoghue*, 49 N. J. Eq. 125; *Jasper v. Maxwell*, 1 Dev. Eq. 357; *Henderson's Est.*, 15 Phila. 598, *accord.* [Cf. *Re Nunburnholme*, [1911] 2 Ch. 510. See *Pitts v. R. I. Co.*, 21 R. I. 544; *Sims v. Sims*, 94 Va. 580; *Gray*, Rule ag. Perp., sec. 120.]

The postponement of the conveyance to the son or other beneficiary may be very easily accomplished even in England. The testator has simply to create a trust for an inconsiderable amount, but attaching to the entire trust fund for the benefit of another person, *e.g.*, the trustee himself. The son cannot then as a matter of absolute right call for a conveyance of the legal title, because he is not the sole *cestui que trust*. He must therefore appeal to the discretion of the court, which would not ordinarily defeat, under such circumstances, the reasonable expectations of the testator. *Harbin v. Masterman*, 12 Eq. 559; *Talbot v. Jevers*, 20 Eq. 255; *Weatherall v. Thornburgh*, 8 Ch. D. 261. See also *Harbin v. Masterman*, [1894] 2 Ch. 184, [1895] A. C. 186.

Where property is given to trustees upon trust for the children of a certain

CLAFLIN *v.* CLAFLIN.

SUPREME JUDICIAL COURT, MASSACHUSETTS. 1889.

149 Mass. 18.

FIELD, J.¹ By the eleventh article of his will as modified by a codicil, Wilbur F. Claflin gave all the residue of his personal estate to trustees, "to sell and dispose of the same, and to pay to my wife, Mary A. Claflin, one third part of the proceeds thereof, and to pay to my son Clarence A. Claflin, one third part of the proceeds thereof, and to pay the remaining one third part thereof to my son Adelbert E. Claflin, in the manner following, viz. ten thousand dollars when he is of the age of twenty-one years, ten thousand dollars when he is of the age of twenty-five years, and the balance when he is of the age of thirty years."

Apparently, Adelbert E. Claflin was not quite twenty-one years old when his father died, but he some time ago reached that age and received ten thousand dollars from the trust. He has not yet reached the age of twenty-five years, and he brings this bill to compel the trustees to pay to him the remainder of the trust fund. His contention is, in effect, that the provisions of the will postponing the payment of the money beyond the time when he is twenty-one years old are void. There is no doubt that his interest in the trust fund is vested and absolute, and that no other person has any interest in it, and the weight of authority is undisputed that the provisions postponing payment to him until some time after he reaches the age of twenty-one years would be treated as void by those courts which hold that restrictions against the alienation of absolute interests

woman, and in default of children upon trust for another person, the one entitled upon default of children may compel a conveyance of the property by the trustee as soon as the woman, not having children, has become so old that in the estimation of the court she must continue childless. *Forty v. Reay*, Dart V. & P. (5th ed.) 345; *Groves v. Groves*, 12 W. R. 45; *Re Widdow's Trusts*, L. R. 11 Eq. 408; *Re Millner's Estate*, L. R. 14 Eq. 245; *Browne v. Taylor*, W. N. (1872) 190; *Maden v. Taylor*, 45 L. J. Ch. 569; *Archer v. Dowsing*, W. N. (1879) 43; *Re Taylor*, 29 W. R. 350; *Croxtan v. May*, 9 Ch. D. 388; *Davidson v. Kimpton*, 18 Ch. D. 213; *Browne v. Warnock*, L. R. 7 Ir. 3; *Mellon's Est.*, 16 Phila. 323. But see *Towle v. Delano*, 144 Mass. 95; *List v. Rodney*, 83 Pa. 483; *Bearden v. White* (Tenn. Ch.), 42 S. W. 476.

— AMES.

¹ Only the opinion of the court is given.

in the income of trust property are void. There has, indeed, been no decision of this question in England by the House of Lords, and but one by a Lord Chancellor, but there are several decisions to this effect by Masters of the Rolls and by Vice Chancellors. The cases are collected in Gray's Restraints on Alienation, §§ 106-112, and Appendix II. [Cases cited.]

These decisions do not proceed on the ground that it was the intention of the testator that the property should be conveyed to the beneficiary on his reaching the age of twenty-one years, because in each case it was clear that such was not his intention, but on the ground that the direction to withhold the possession of the property from the beneficiary after he reached his majority was inconsistent with the absolute rights of property given him by the will.

This court has ordered trust property to be conveyed by the trustee to the beneficiary when there was a dry trust, or when the purposes of the trust had been accomplished, or when no good reason was shown why the trust should continue, and all the persons interested in it were *sui juris* and desired that it be terminated; but we have found no expression of any opinion in our reports that provisions requiring a trustee to hold and manage the trust property until the beneficiary reached an age beyond that of twenty-one years are necessarily void if the interest of the beneficiary is vested and absolute. See *Smith v. Harrington*, 4 Allen, 566; *Bowditch v. Andrew*, 8 Allen, 339; *Russell v. Grinnell*, 105 Mass. 425; *Inches v. Hill*, 106 Mass. 575; *Sears v. Choate*, 146 Mass. 395. This is not a dry trust, and the purposes of the trust have not been accomplished if the intention of the testator is to be carried out.

In *Sears v. Choate* it is said, "Where property is given to certain persons for their benefit, and in such a manner that no other person has or can have any interest in it, they are in effect the absolute owners of it, and it is reasonable and just that they should have the control and disposal of it unless some good cause appears to the contrary." In that case the plaintiff was the absolute owner of the whole property, subject to an annuity of ten thousand dollars payable to himself. The whole of the principal of the trust fund, and all of the income not expressly made payable to the plaintiff, had become vested in him when he reached the age of twenty-one years, by way of resulting trust, as property undisposed of by the will. Apparently the testator had not contemplated such a result, and had made no provision

for it, and the court saw no reason why the trust should not be terminated, and the property conveyed to the plaintiff.

In *Inches v. Hill*, *ubi supra*, the same person had become owner of the equitable life estate and of the equitable remainder, and "no reason appearing to the contrary," the court decreed a conveyance by the trustees to the owner. See *Whall v. Converse*, 146 Mass. 345.

In the case at bar nothing has happened which the testator did not anticipate, and for which he has not made provision. It is plainly his will that neither the income nor any part of the principal should now be paid to the plaintiff. It is true that the plaintiff's interest is alienable by him, and can be taken by his creditors to pay his debts, but it does not follow that, because the testator has not imposed all possible restrictions, the restrictions which he has imposed should not be carried into effect.

The decision in *Broadway National Bank v. Adams* rests upon the doctrine that a testator has a right to dispose of his own property with such restrictions and limitations, not repugnant to law, as he sees fit, and that his intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy. The rule contended for by the plaintiff in that case was founded upon the same considerations as that contended for by the plaintiff in this, and the grounds on which this court declined to follow the English rule in that case are applicable to this, and for the reasons there given we are unable to see that the directions of the testator to the trustees, to pay the money to the plaintiff when he reaches the age of twenty-five and thirty years, and not before, are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own.

In *Sanford v. Lackland*, 2 Dillon, 6, a beneficiary who would have been entitled to a conveyance of trust property at the age of twenty-six became a bankrupt at the age of twenty-four, and it was held that the trustees should convey his interest immediately to his assignee, as "the strict execution of the trusts in the will have been thus rendered impossible." But whether

a creditor, or a grantee of the plaintiff in this case would be entitled to the immediate possession of the property, or would only take the plaintiff's title *sub modo*, need not be decided. The existing situation is one which the testator manifestly had in mind and made provision for; the strict execution of the trust has not become impossible; the restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make; other provisions for the plaintiff are contained in the will, apparently sufficient for his support, and we see no good reason why the intention of the testator should not be carried out. *Russell v. Grinnell*, 105 Mass. 425. See *Toner v. Collins*, 67 Iowa, 369; *Rhoads v. Rhoads*, 43 Ill. 239; *Lent v. Howard*, 89 N. Y. 169; *Barkley v. Dosser*, 15 Lea, 529; *Carmichael v. Thompson*, 5 Cent. Rep. 500; *Lampert v. Haydel*, 20 Mo. App. 616.

*Decree affirmed.*¹

¹ *Shelton v. King*, 229 U. S. 90; *Estate of Yates*, 170 Cal. 254; *Lunt v. Lunt*, 108 Ill. 307; *Wallace v. Foxwell*, 250 Ill. 616; *Wagner v. Wagner*, 244 Ill. 101, *accord*. See *Rhoades v. Rhoades*, 43 Ill. 239; *Avery v. Avery*, 90 Ky. 613; *Miller v. Miller*, 172 Ky. 519; *Young v. Snow*, 167 Mass. 287; *Danahy v. Noonan*, 176 Mass. 467. See also *Gray, Rule ag. Perp.*, c. 4; *Kales, Fut. Int.*, secs. 288-294; *Pomeroy, Eq. Juris.*, sec. 991; 24 *Harv. L. Rev.* 224; 65 *U. Pa. L. Rev.* 647-650.

On the power of the court, under special circumstances, to hasten the enjoyment of a trust fund, see *Bennett v. Nashville T. Co.*, 127 Tenn. 126, 46 *L. R. A. (N. S.)* 43.

In *Dale v. Guaranty Trust Co.*, 168 N. Y. App. Div. 601, where the beneficiary of a trust to receive and apply the income of personal property, which trust was by statute inalienable, obtained a conveyance of the remainder, it was held that he could not call for a conveyance of the fund. See also *Bowlin v. Citizens' Bk. (Ark., 1917)*, 198 S. W. 288, and *Mason v. R. I. etc., Co.* 78 Conn. 81, in which the beneficiary of a spendthrift trust acquired the remainder.

A provision postponing enjoyment does not prevent alienation. *Re Hall's Estate*, 248 Pa. 214. See *Bronson v. Thompson*, 77 Conn. 214.

A postponement of enjoyment, which is otherwise valid, is invalid if it is to be effective for too long a time. See *Armstrong v. Barber*, 239 Ill. 389, 403; *Winsor v. Mills*, 157 Mass. 362, 364; *Southard v. Southard*, 210 Mass. 347; *Re Shallcross's Est.*, 200 Pa. 122. See *Gray, Rule ag. Perp.*, secs. 121i, 121j; *Kales, Fut. Int.*, secs. 293, 294; 20 *Harv. L. Rev.* 202; 10 *Mich. L. Rev.* 31, 37.

In jurisdictions in which the doctrine of the principal case is recognized, a direction for an accumulation in the case of a charitable trust is valid, unless for so long a time as to be unreasonable. *Brigham v. Peter Bent Brigham Hosp.*, 134 Fed. 513; *Girard T. Co. v. Russell*, 179 Fed. 446; *Woodruff v. Marsh*, 63 Conn. 125; *St. Paul's Church v. A. G.*, 164 Mass. 188; *Ripley v. Brown*, 218 Mass. 33; *Collector of Taxes v. Oldfield*, 219 Mass. 374; *Oldfield v. A. G.*, 219 Mass. 378; *Gray, Rule ag. Perp.*, 3 ed., sec. 679a. In jurisdictions in which the doctrine of the principal case is not recognized, a provision

STOKES *v.* CHEEK.

CHANCERY. 1860.

28 Beav. 620.

THE testatrix bequeathed an annuity of 30*l.* to William Cheek, an annuity of 30*l.* to Eliza Stokes, and other like annuities, and she authorized her trustees to sell her freeholds, copyholds and leaseholds, and directed them, out of the produce, to purchase government annuities for the respective annuitants. The will contained the following clause:—

“And I declare, that no one of the annuitants hereinbefore named shall be, nor shall the executors or administrators of any of them be, *allowed to accept the value of the annuity* to which he or she, respectively, shall be entitled, in lieu thereof, and that the beneficial life interest of each female annuitant shall be and remain free from the control and engagements of her husband for the time being, and as her separate property.”

The estate had been sold, and the cause came on for further consideration. The question was, whether the annuitants were entitled to receive the amount necessary to purchase the annuities, instead of having the annuities purchased for them.

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY]. I have, on several occasions, held, that annuitants are entitled to receive the money necessary to purchase their annuities.

It would be an idle form to direct an annuity to be purchased, which the annuitants might sell immediately afterwards.

The annuitants are entitled to such a sum as would be required to purchase their annuities.¹

for accumulation is invalid. *Wharton v. Masterman*, [1895] A. C. 186, [1894] 2 Ch. 184.

If a trustee sees fit to convey to a *cestui que trust* who has the entire beneficial interest in the property, there is no one who has any standing to file a bill against the trustee even though the conveyance defeats the intention of the creator of the trust. *Lemen v. McComas*, 63 Md. 153; *Partridge v. Clary*, 228 Mass. 290. See *Brophy v. Lawler*, 107 Ill. 284; *Ames*, 458*n.* But see *Lent v. Howard*, 89 N. Y. 179, 181 (interest of *cestui que trust* inalienable by statute); *Cuthbert v. Chauvet*, 139 N. Y. 326 (*semble*); *Stambaugh's Est.*, 135 Pa. 585 (spendthrift trust).

¹ *Re Browne's Will*, 27 Beav. 324; *Roper v. Roper*, 3 Ch. D. 714, 721; *Re Mabbett*, [1891] 1 Ch. 707; *Parker v. Cobe*, 208 Mass. 260; *Reid v. Browne*, 54 N. Y. Misc. 481; *Matter of Cole*, 174 N. Y. App. Div. 534, *accord.* If the legatee dies before the annuity is purchased, his representatives are entitled

Re PHILBRICK'S SETTLEMENT.

CHANCERY. 1865.

34 L. J. Ch. 368.

By a deed-poll, dated the 4th of March, 1846, a fund was vested in trustees, upon trust, for the separate use of Hannah Philbrick, a married woman, for her life, and after her death upon such trusts as she should by will appoint.

By her will, dated the 20th of June, 1856, and expressed to be made in pursuance of the power, Hannah Philbrick appointed the fund to various persons, giving a life-interest in part of it to her husband, and appointed two executors. She died in June, 1864, and her executors proved her will.

The trustees of the deed-poll being in doubt whether they ought to hand over the trust-fund to the executors, or to distribute it themselves among the appointees, paid the fund into court under the Trustee Relief Act.

The executors thereupon presented a petition for the payment to them of the fund, to be administered by them in accordance with the appointment contained in the will.

Mr. Baggallay, and *Mr. Hardy*, for the petitioners.

Mr. Charles Hall, for the trustees of the deed-poll, submitted that they were the proper persons to distribute the fund. . . .

THE MASTER OF THE ROLLS [SIR JOHN ROMILLY] said that where the donee of a general power appointed the property to the amount which would have been required to purchase it. *Palmer v. Craufurd*, 3 Swanst. 482; *Re Brunning*, [1909] 1 Ch. 276.

If there is a contingent gift over of the annuity, the annuitant cannot insist on taking the purchase price of the annuity or any part of it. *Hatton v. May*, 3 Ch. D. 148; *Re Dempster*, [1915] 1 Ch. 795. Cf. *Lejee's Est.*, 181 Pa. 416.

If the annuity is not to be purchased but simply to be charged on the testator's estate, the annuitant is not entitled to a lump payment of the value of the annuity. *Yates v. Yates*, 28 Beav. 637.

See *Gray, Restraints*, secs. 83-89.

If a testator devises or bequeaths property and directs that it be sold or converted into other property, the legatee if *sui juris* may elect to take the property in specie. *Craig v. Leslie*, 3 Wheat. (U. S.) 563.

If there are several legatees and all are *sui juris* and consent, the result is the same. *Huber v. Donoghue*, 49 N. J. Eq. 125; *Mellen v. Mellen*, 139 N. Y. 210; *Trask v. Sturges*, 170 N. Y. 482; *Nye v. Koehne*, 22 R. I. 118.

But unless they are all *sui juris* and consent, the directions of the testator must be followed. *McDonald v. O'Hara*, 144 N. Y. 566.

certain persons beneficially, the original trustees were bound to carry the appointment into execution; but if the donee appointed the property to trustees, those trustees were entitled to receive the property to be held upon the trusts declared by the donee; and when a married woman made a will in exercise of a power, and appointed executors, inasmuch as she could only make her will by virtue of the power, and could only have appointed the executors for the purpose of administering the appointed property, she must be considered to have appointed the property to the executors as trustees.

The expression in the judgment in *Platt v. Routh*, that the executor could not have administered any part of the appointed property, only meant that, "but for the will exercising the power," the executor could not have administered.

By the appointment of executors, the duty of administering the fund was, in his Honor's opinion, taken away from the original trustees, and committed to the executors; and the provisions of the 23 Vict. c. 15, rather confirmed this view than otherwise. The fund must, therefore, be paid to the petitioners.¹

BUSK *v.* ALDAM.

CHANCERY. 1874.

L. R. 19 Eq. 16.

THIS was a demurrer. The statements in the bill were as follows:—

By will, dated in 1839, T. B. Pease, after giving 5,000*l.* to three trustees, upon trust, to invest and pay the income to his daughter, Hannah Ford, for her life, with power to her to appoint the fund to her children "in such manner" as she should direct, and in default of appointment to her children in equal shares, gave a sum of 10,000*l.* to the same trustees

¹ *Cooper v. Thornton*, 3 Bro. C. C. 96, 186; *Angier v. Stannard*, 3 M. & K. 566, 571; *Wetherell v. Wilson*, 1 Keen 80, 86; *Poole v. Pass*, 1 Beav. 600; *Hayes v. Oatley*, L. R. 14 Eq. 1; *Re Hoskin's Trusts*, 5 Ch. D. 229; 6 Ch. D. 281, s. c., *accord.* — AMES.

If a *cestui que trust* devises his interest to a new set of trustees upon a trust which fails, the new set of trustees may require a transfer of the legal estate from the old set of trustees, even though, under the doctrine of *Burgess v. Wheate*, 1 W. Bl. 123, there is no one entitled by way of resulting trust. *Onslow v. Wallace*, 1 Hall & T. 513.

upon like trust for his daughter, Susanna Busk, and with like power to her to appoint.

By will, dated in 1868, Susanna Busk appointed the fund of 10,000*l.* amongst the objects of the power, three of whom were, and still are, infants, and directed that it should be paid and transferred to the trustees of her will.

The present bill was filed against the trustees of the will of T. B. Pease by the trustees of the will of Mrs. Busk, to compel payment and transfer to them of the fund of 10,000*l.* The defendants demurred.

Davey, for the defendants, said that the direction to transfer the fund to new trustees was not authorized by the words creating the power, inasmuch as the power was special, not general.

Cookson, for the plaintiffs, contended that the transfer should be granted on the ground of convenience and authority.¹

SIR R. MALINS, V. C., after stating the facts, continued: So far as the appointment by Mrs. Busk to trustees is concerned, it has been held by a long series of decisions that it is a valid exercise of the power of appointment, and that the appointment is just as good as if it had been made direct to the objects of the power. But this bill is filed for the purpose of having the fund transferred from the trustees in whose control it is now placed to those to whom it is appointed. For what object this is desired I cannot understand. It is said that it would be very convenient to have the fund placed in the hands of the new trustees. But I cannot look at that. I must consider what was intended to be done by the original testator; and I can see that such a transfer as is asked would violate his intention. I asked Mr. Cookson whether he contended that a mere appointment of new trustees by the donee of the power would have been valid, and he pressed upon me that, on the authority of the cases cited, the court was bound to hand over the fund to the new trustees.

Now there is, first of all, the case of *Thornton v. Bright*, 2 My. & Cr. 230, which simply decides that an appointment to a person not an object of a power as trustee for a person who is an object is a valid exercise of the power; and there are also *Kenworthy v. Bate*, 6 Ves. 793; *Trollope v. Linton*, 1 S. & S. 477; *Cowx v. Foster*, 1 J. & H. 30; and *Fowler v. Cohn*, 21 Beav. 360. But those were all cases where there was real estate to be converted and no person appointed to effect the conversion, and

¹ This statement of the case is taken from 23 W. R. 21.

it was decided that in that case an appointment to trustees to sell and convert and distribute the proceeds amongst the objects of the power was a valid execution of the power. But I am unable to see how that can be an authority for taking away a fund from trustees who are fit and proper, and handing it over to others who may not be so fit, in a case where the duty of the trustees is simply to hold the fund.

I am asked to treat these cases as establishing a general law, that where, in all cases, a fund is settled upon trust for a mother for life, and then upon trust for her children as she should appoint, and she appoints to trustees for her children, the first trustees are bound to hand over the fund to the trustees appointed by the daughter. Here nothing more is required than that some one should hold the fund, and it is suggested that I am bound to hand it over to the second trustees.

Mr. Cookson says that I decided the point in *Ferrier v. Jay*, L. R. 10 Eq. 550. But what I there decided was, that where there was a general and a special power, and an appointment was made of both funds together to trustees in trust to pay debts and to apply the residue for the objects of the special power, the appointment must be read *reddendo singula singulis*, and the fund coming under the general power applied in the first instance to the purposes to which the fund subject to the special power was not applicable. I agreed with the decision in *Cowx v. Foster*, 1 J. & H. 30, that the circumstance of directing debts to be paid only meant that they were to be paid out of the particular portion of the mixed fund which could be so applied.

I did also, in that case, undoubtedly, say that the second trustees were the most fit persons to have charge of the fund; but I did not say that where it was a mere question which of two sets of trustees should hold a particular fund, the court would, necessarily, hand it over to the second set in point of date.

*The demurrer will be allowed.*¹

¹ *Re Tyssen*, [1894] 1 Ch. 56; *Re Mackenzie*, [1916] 1 Ch. 125, *accord*. See *Scotney v. Lomer*, 29 Ch. D. 535, 545, per North, J., and s. c., 31 Ch. Div. 380, 386, per Cotton, L. J.

But if the settlor intended to allow the donee of the power to substitute new trustees, then of course the donee may do so. *Re Paget*, [1898] 1 Ch. 290; *Re Adams' Trustees*, [1907] 1 Ch. 695.

APPENDIX

FORM OF TRUST-DEED.

THIS INDENTURE made this first day of January, 1919, between JOHN DOE, of Boston, in the County of Suffolk and Commonwealth of Massachusetts, party of the first part, and RICHARD ROE, of said Boston, hereinafter referred to as the Trustee, party of the second part, WITNESSETH:

That in consideration of the agreement of the Trustee to undertake the duties of trustee hereinafter provided, the party of the first part hereby gives, grants, bargains, sells and conveys to the Trustee all the property, both real and personal, set forth in a schedule dated this day and signed by the parties hereto, together with such other property as he may at any time hereafter add hereto.

To HAVE AND TO HOLD the same to the party of the second part, his heirs, executors, administrators and assigns to his own use and behoof forever, BUT IN TRUST NEVERTHELESS, for the following uses and purposes:

To have the care, custody and possession of the said property and to keep the same invested and to collect the income thereof; and to pay the net income after deducting all charges and expenses including a reasonable compensation for his own services at least quarterly to John Styles during his life, and at the death of said John Styles to pay over the principal of the said fund together with all increment and accrued income thereof to the issue of the said John Styles, *per stirpes*, or if he leaves no issue then to such persons as would be entitled to his personal estate under the statutes of distribution then in force.

The Trustee herein named and any succeeding trustee, in addition to the powers incidental to his office, shall have power to make and change investments, converting personal property into real property and the reverse whenever he or they think it advisable; to exchange any real estate for other real estate and to sell at any time or times by public auction or private contract any property, real or personal, of which the trust funds may at any time consist, as he or they think best, and may convey the same in fee or for any less estate, and no purchaser shall be required to see to the application of the purchase

money; to rescind or vary any contract of sale and re-sell without being liable for loss; and to erect, alter, improve, tear down or rebuild buildings and to lease the real estate for long or short terms or on building leases, part of the consideration for which is building on or adding to the premises by the lessee; to compromise or compound any debts owing to him or them as such trustees or any other claims and to adjust any disputes in relation to debts or claims by arbitration or otherwise and to pay any debts or claims against him or them as such trustee or trustees upon any evidence that to him or them shall seem sufficient; he or they may apportion all extra dividends and gains from sales of unproductive real estate and other receipts and all expenditures and payments and all losses of income during alterations or improvement of real estate between income and principal as to him or them seems fair and just and any such apportionment made in good faith shall be final; he or they may consider and pay out all sums received as interest, as income, although the securities may have been purchased at a premium, and may charge expenses and so much of the premium paid for the securities to income or principal as he or they shall deem equitable and may in general use his or their discretion in determining the question as to what receipts and what payments are income and principal, which discretion exercised in good faith shall be final; he or they shall have power to appoint agents to act under him or them in the administration of this trust and to select depositories of the funds and securities of the trust. The Trustee herein named and any succeeding trustee may at any time by an instrument in writing appoint his successor, and upon the acceptance in writing by such successor the title to the trust property shall immediately vest in him. No trustee shall be liable for any error of judgment on his part in administering this trust or in appointing any agent or depository, nor for any default or neglect or error of judgment of any co-trustee, nor for leaving the trust funds in the custody or control of any co-trustee, but shall be liable only for his own wilful neglect and default. No trustee hereunder shall be required to give any bond.

IN WITNESS WHEREOF, the party of the first part has hereto set his hand and seal and the party of the second part, in token of his acceptance of the said trust, has hereto set his hand, the day and year first above written.

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